

1 showing that Agent Delaney, in drafting his affidavit, was
2 intentionally dishonest or acted with reckless disregard to the
3 truth. He's not -- his motion -- I don't see anything that
4 suggests Agent Delaney was acting with intentional dishonesty.
5 I don't think there's anything in there to suggest he was being
6 dishonest. Even assuming the Court thought that was a
7 possibility, they've got to show --

8 THE COURT: Well, I don't think it's got to be
9 intentionally dishonest. It could be a material
10 misrepresentation by negligence or oversight or something else
11 or leaving something out.

12 MR. SANDERS: I think he has to show that it was an
13 intentional dishonest act or that he acted with reckless
14 disregard for the truth and then, also, that that is a material
15 misrepresentation.

16 THE COURT: All right.

17 MR. SANDERS: The omissions or the alleged
18 misrepresentations, I don't think they've shown under the
19 totality of the circumstances, which is what *Franks v. Delaware*
20 requires, that any of it is material.

21 Under the totality of the circumstances, what *Franks*
22 requires is if you took everything they refer to in their
23 motion, everything they refer to as the omissions and what
24 they've referred to as the misleading statements, if you put
25 every bit of that back into a hypothetical affidavit of what we

1 put in the affidavit -- frankly, it's the Government's position
2 that if we'd attached every transcript of every phone call
3 made, there would have been probable cause.

4 Certainly with what they've got here, they've not made any
5 showing that the Court would -- understanding the statements
6 they refer to, most of which are the ones between Balducci and
7 Lackey, if the Court had been aware of those statements in the
8 affidavit under the totality of the circumstances, of course
9 the Court would still have found probable cause.

10 The totality of the circumstances they've referred to --
11 and I can go through a few of these point by point if the Court
12 wants me to. They refer to a number of statements where
13 Balducci -- and we heard him this morning talking about it --
14 is telling the judge, "I don't want to make you uncomfortable,"
15 those statements that he's referring to.

16 Obviously, what Balducci was saying to the Court is, as I
17 said in my response, he is attempting to put the Court at ease.
18 He's been asked by the defendants to go to his mentor and do
19 something highly inappropriate. He's aware of that. He
20 admitted that it was extremely awkward. He's doing that, and
21 it's obvious that Balducci is trying to straddle the fence, as
22 it were.

23 He wants to offer or say something to Judge Lackey that's
24 extremely inappropriate, but he also wants to maintain at least
25 his relationship with Judge Lackey. It's not surprising that

1 he's going to continue to try to put the judge at ease, more so
2 after Judge Lackey has recused. Obviously, Judge Lackey is
3 nervous about this and Balducci wants to put him at ease.
4 That's essentially the statements they're referring to with
5 Judge Lackey and Balducci.

6 They refer, also, to one where Balducci says, for
7 instance, Judge, those are just some ideas that I put down on
8 paper for Your Honor to think about. Those weren't just, you
9 know, bullet points, just some ideas for the judge to consider.
10 As we pointed out in the affidavit, that was actually the order
11 compelling arbitration with Judge Lackey's signature line at
12 the bottom of it. That was Balducci trying to influence the
13 judge, very much trying to influence the judge.

14 In addition to that, Your Honor, the fact that Balducci
15 goes to Judge Lackey and is saying, We think it's right,
16 doesn't take away from -- if you're speaking to a judge and
17 trying to influence him in a corrupt manner and eventually
18 bribe him, it doesn't matter whether you believe the decision
19 is legally correct or not. That doesn't really have an effect
20 on it. Balducci is obviously -- all he's trying to do is put
21 Judge Lackey at ease; and that's what's very, very clear from
22 the statements the defendants refer to.

23 They refer, also, to the Patterson wire. They point out
24 three different instances that they describe as omissions or
25 materially misleading statements. The first one was a

1 September 27th statement that Patterson -- that Patterson's
2 making to Balducci with respect to P.L. Blake. On September
3 the 27th, Patterson was talking to Balducci; and as the
4 defendants point out, he tells him that P.L. Blake and
5 Patterson discuss this \$40,000 problem that they're having.

6 In the middle of that statement, Patterson did say to
7 Balducci, P.L. doesn't know what it's about. That statement
8 was taken out of the affidavit specifically because on October
9 the 16th, when we eventually submitted that affidavit to the
10 Court, P.L. had already called Patterson back. Patterson had
11 already called Balducci again and said, "P.L. wants to know now
12 when the judge is going to sign the order."

13 The reason that statement was omitted from the affidavit
14 was because there was probable cause to believe by that time
15 that P.L. knew precisely what it was about. He'd asked about
16 40,000 back in September. Now on October 10th, he's already
17 saying: When is the order going to be signed?"

18 THE COURT: Was that put in the affidavit, that P.L.
19 had called him and back and said, When's the judge going to
20 sign the order?

21 MR. SANDERS: I'm sorry, Judge, was --

22 THE COURT: You didn't put in that P.L. doesn't know
23 what it's about. Did you put in that P.L. now knows what it's
24 about?

25 MR. SANDERS: Yes, sir. As a matter of fact, in the

1 Patterson affidavit, we said that the first call was placed by
2 Steve Patterson from the target telephone -- the last call was
3 placed by Patterson. Telephone toll records from the phone
4 reflect -- wait a minute. I'm sorry.

5 MR. TRAPP: Excuse me. Can you tell us where you are
6 while you do that, once you get there?

7 MR. SANDERS: Yeah, I can. If the Court could
8 indulge me just one second, Judge. I found it. It's in the
9 affidavit for the Patterson authorization. It's on page 6 in
10 Paragraph 15. We pointed out to the Court that on October the
11 10th Steve Patterson placed a call from the target phone to Tim
12 Balducci and requested Balducci to find out when the order
13 would be signed.

14 Balducci asked Patterson if there was a problem with the
15 deal; and Patterson responds, "P.L. wants to know." That's
16 precisely why it wasn't mentioned. We felt certainly there was
17 probable cause by October 16th to feel that P.L. Blake did know
18 something about why the 40,000 was being paid.

19 They also point to, in their motion, on October 27th a
20 couple of statements Balducci made when he was meeting with the
21 judge. These are the statements they refer to as gutting the
22 Government's case. These are the statements Balducci made to
23 the judge when he said something to the effect that only he and
24 the judge knew what was going on.

25 Again, this was an affidavit submitted on October the

1 16th. We knew, however, that on September the 27th what he was
2 saying -- when Balducci said, "only he and Scruggs knew about
3 it," we knew when he said it that it wasn't true. That wasn't
4 true. We knew, and it's in the affidavit that on his way over
5 to meet with the judge he was talking to Patterson about it.

6 Also, by October the 10th, he has already mentioned,
7 again, that P.L. Blake has called and wanted to know about the
8 order. We know that Patterson; we know that Blake, at least
9 from a probable cause perspective; we know Mr. Scruggs --
10 obviously, we performed surveillance, that's also in the
11 affidavit on September 27; that Balducci leaves the judge's
12 chambers and goes straight to the Scruggs Law Firm. These are
13 the reasons that those type statements were left out. We knew
14 he wasn't telling the truth when he said that.

15 Finally, they point to a statement made -- that Balducci
16 made to Judge Lackey on October 10th. They are talking on the
17 phone, I believe; and Balducci says they talk about the order.
18 And then at the end of that conversation -- it's a short
19 conversation -- Tim says he is going to get back to him about
20 that other deal.

21 They cite this to suggest that Tim Balducci was unaware
22 that the \$40,000 had anything to do with the order the judge
23 was going to enter in the *Scruggs v. Jones* case. I said in my
24 motion, Judge, that based on the totality of the circumstances
25 before the Court at that time that that was nonsense; that

1 there were a number of occasions that we pointed to in both
2 affidavits where the judge specifically referred to the \$40,000
3 and the order being entered in the *Scruggs v. Jones* case.

4 So in the end, Your Honor, under a totality of the
5 circumstances test, which would include these statements to
6 which they refer, all the statements that are in the affidavit
7 already up to and including September the 18th, when Judge
8 Lackey asks if they would help him if he helps them, also when
9 Judge Lackey asks for \$40,000 and Tim agrees to it, all of
10 these are to be taken into consideration.

11 The fact that when he leaves the judge's chambers the day
12 that the judge requested the \$40,000 he immediately, at 10:08,
13 which is the same time Judge Lackey is calling the FBI -- he
14 immediately calls the Scruggs Law Firm. All of these taken
15 into consideration, in addition to the statements the
16 defendants refer to, certainly there would still be probable
17 cause in such an affidavit. So for those reasons, Your Honor,
18 the Government believes there's no reason for an evidentiary
19 hearing pursuant to *Franks v. Delaware*.

20 MR. KEKER: May I respond to some of those
21 statements --

22 THE COURT: Would the Government be willing to
23 stipulate that the statements the defendants say were made and
24 the statements that the defendants say were left out could be
25 put into a hypothetical affidavit or added to this affidavit,

1 and that the Court could look at it and ascertain whether or
2 not probable cause existed without having to put testimony in
3 on it?

4 MR. SANDERS: Absolutely, Your Honor.

5 THE COURT: What do you say to that, Mr. Keker?

6 MR. KEKER: I don't think that's sufficient for the
7 *Franks* standard, Your Honor, for the following reasons --

8 THE COURT: Well, okay, but I'm just talking about --
9 it would be a *Franks*-type motion -- hearing, but it would just
10 be by stipulation of what -- that the testimony you hope to
11 elicit from the agent would be admitted to.

12 MR. KEKER: I understand that, Your Honor. And I
13 still think that it's important that the -- the hearing is
14 important to determine what we've now heard from the
15 Government, that a lot of this -- some of this -- I don't know
16 how much of it -- but was done intentionally, intentionally
17 left things out; and are now making arguments about why it is
18 okay to intentionally leave them out as opposed to meeting some
19 other negligence or reckless standard, that's one thing.

20 And second, I think to have Agent Delaney up there to
21 explain why, if you had gotten this application on
22 September 25, which is when the order was signed -- it was
23 before any bribe had been paid; it was after Judge Lackey had
24 talked about wanting \$40,000.

25 And if somebody had told you then that what really

1 happened in the first meeting was that Scruggs said, "I don't
2 want anything illegal, just go talk to your friend, make sure
3 that he understands we want arbitration; that there was no
4 bribe paid; there was no quid pro quo; that there was no
5 discussion of any of that; that by the time the wire was up and
6 running, there were several times where Balducci made it plain
7 that he wasn't about that, about seeking a bribe or doing a
8 bribe or anything like that.

9 May 9th, May 21, I think the agent can explain why he left
10 out completely the recusal business where Judge Lackey just
11 walks away from the case; and maybe the agent can tell us
12 whether or not the agent told him to get back on the case. It
13 left out completely -- it goes from -- as I recall, from May 9,
14 it goes to September 18. It leaves out the summer when he's
15 doing all the business that you know he's doing.

16 And then they come to you on September 25th with an
17 affidavit that makes it sound like this is all of the piece.
18 You read it and, basically, what that affidavit says is
19 Balducci came to him, made a corrupt overture; he went right to
20 the U.S. Attorney. False. The corrupt overtures continued.
21 False.

22 **THE COURT:** Or whether it could have been viewed as a
23 corrupt overture by the person to whom it was made.

24 **MR. KEKER:** That's another thing that I think Agent
25 Delaney could help us with if he got on the stand. There's

1 that affidavit, so we deal with that one separately with Agent
2 Delaney. And then you sort of think about whether or not that
3 meets the totality of the circumstances test for, if I -- if
4 all of this was in there, would there be a different -- and the
5 reviewing court would have the ability to do it, too. If all
6 this were in there, would things have looked different? But
7 then we go on to the one that's really bad.

8 On October 16, wouldn't it have been good and aren't we
9 entitled to an explanation of why this agent leaves out all
10 this business about P.L. Blake didn't know what this was about?
11 I understand they've got an argument that, oh, maybe he did
12 later; we changed our mind about that, and completely leaves
13 out exculpatory information.

14 But most important, all the pushing Judge Lackey did about
15 how Scruggs knows about this, doesn't he? Scruggs is on it.
16 Scruggs knows about what's going on. And he's told no. The
17 notion that they think that they can just -- I mean, that that
18 wouldn't affect that Patterson affidavit. And then it gets
19 repeated again. And then all of this kind of melds together
20 when they come back for the search warrant.

21 By that time, they've talked to Balducci; and what he puts
22 in that search warrant really doesn't measure up based on what
23 Balducci's already telling them. We see that now that we've
24 seen these Balducci statements.

25 So we're asking for, again, a short examination of Agent

1 Delaney about why -- what's not in, what's in, and why he
2 didn't do it. And we think that that would make a suitable
3 record from which you could then rule on this motion and see
4 what affected what. Because the first wiretap affects the
5 second wiretap, affects the third wiretap, affects the search.

6 THE COURT: Well, since this -- I think this area of
7 the -- goes to the heart of the case. I'll allow your short
8 examination of Agent Delaney on that area, the wiretap
9 information is the gut of the case against these defendants.

10 And, so, the motion will be granted to examine Agent
11 Delaney. You say a short examination. I don't know what you
12 mean by short, but I would say an hour at the most.

13 MR. KEKER: What I mean by short is what you tell me
14 short is.

15 THE COURT: Well, I think an hour is reasonable.

16 MR. SANDERS: Your Honor, if the Government could, we
17 would do the same as we did earlier. If the Court wants us to
18 do it that way, we will call Delaney ourselves.

19 THE COURT: If that's what you prefer.

20 MR. KEKER: And under the same rules, it's clear that
21 a Government agent is a Government witness, no matter who calls
22 them. So if we could get the Jencks Act material now, it would
23 be helpful so that when the time comes --

24 THE COURT: It may shorten it up so --

25 MR. KEKER: Yes, sir.

1 **THE COURT:** The Government will be instructed to do
2 that. Again, I'm not ordering that the Government give him all
3 the prior information, just the statements that he's made
4 concerning this area of his testimony.

5 **MR. SANDERS:** Yes, sir, Your Honor. I've already
6 prepared Jencks with that in mind.

7 **THE COURT:** Okay. Good. All right. Call Agent
8 Delaney.

9 (THE WITNESS IS SWORN)

10 **WILLIAM P. DELANEY, GOVERNMENT'S WITNESS, SWORN**

11 **DIRECT EXAMINATION**

12 **THE CLERK:** State your name clearly for the record,
13 please.

14 **THE WITNESS:** It's William P. Delaney.

15 **THE COURT:** All right, sir, you may proceed.

16 **BY MR. SANDERS:**

17 Q. Agent Delaney, if you could, for the record, would you
18 tell us what you do for a living?

19 A. I'm a Special Agent with the Federal Bureau of
20 Investigation.

21 Q. And in your position as an agent with the FBI, you had the
22 opportunity to investigate a case involving the Scruggs Law
23 Firm, the defendants in this case?

24 A. Yes, I have.

25 Q. All right. And was it you who signed the affidavits

1 submitted in this case for authorization for wiretaps and for a
2 search warrant?

3 A. Yes, I was.

4 Q. When did you sign those affidavits?

5 A. I signed the first affidavit September 25th, 2007; the
6 second one October 16th, 2007; and I believe the last one
7 November 26th, I believe, 2007.

8 Q. When was the extension for the Balducci wiretap; do you
9 know?

10 A. I think it was the same day. I think it was October 16th.

11 Q. Could it have been October 24th?

12 A. Yes.

13 Q. Okay. I want to ask you -- you're familiar with this.
14 There's a motion been filed pursuant to *Franks v. Delaware*.
15 And the defendants have filed a motion pointing to specific
16 portions of conversations you left out of the affidavit. What
17 I want to do is I want to walk through the sentences to which
18 they refer, and I'm going to ask you why you left these out.
19 Do you understand?

20 A. Yes, sir.

21 Q. All right. Specifically, the defendants initially state
22 that you drafted in your affidavit that Judge Lackey called the
23 Government at the conclusion of his first meeting with Tim
24 Balducci. Was that accurate? Was it after the meeting had
25 concluded?

1 A. That was my understanding, yes.

2 Q. Okay. What do you mean by, *that was my understanding*?

3 A. The way I was involved in this, my supervisor called me
4 that the U.S. Attorney's Office in Oxford had been notified of
5 this event and asked me to contact him. He gave me the
6 impression that Judge Lackey had been approached by an attorney
7 inappropriately, and he asked me to look into it. I then
8 contacted the U.S. Attorney's Office. They basically gave me
9 the same information.

10 Shortly thereafter, I contacted Judge Lackey, interviewed
11 him in person; and he gave me the same impression; that
12 Mr. Balducci had approached him, called him, come down to visit
13 with him, made inappropriate overtures to him. And shortly
14 thereafter, he contacted the U.S. Attorney's Office.

15 Q. And do you know ow now how long after it was that he
16 contacted the U.S. Attorney's Office?

17 A. My understanding now is it'd been two weeks.

18 Q. Okay. They also point out on May the 4th -- and by the
19 way, you were familiar with the phone call that Judge Lackey
20 had with Mr. Balducci after this initial meeting with Judge
21 Lackey?

22 A. Yes, sir.

23 Q. Okay. On May the 4th, was there a conversation between
24 Judge Lackey and Tim Balducci?

25 A. Yes, there was.

1 Q. All right. And they point specifically to a sentence that
2 was not included in the affidavit, and I want to read that
3 sentence they're pointing to. They said that Tim said, "Here's
4 just some thoughts, ideas, and suggestions I thought I'd put on
5 paper to see if His Honor might be interested in." Do you
6 remember Balducci saying that?

7 A. Yeah, I remember that from the recording, yes, sir.

8 Q. All right. Why was that not included in your affidavit?

9 A. I didn't give much weight to that considering what had
10 happened earlier in the day when Mr. Balducci had, unsolicited,
11 faxed an order to the judge in his office; and the order had a
12 signature line at the bottom. To me, it seemed more --
13 obviously, Mr. Balducci was more interested in having the judge
14 sign and enter that order than just trying to give him some
15 thoughts and ideas about the case.

16 Q. All right. I want to move now to May the 9th. Did
17 Balducci and Lackey speak together on May the 9th?

18 A. Yes, they did.

19 Q. All right, sir. I'm going to read to you, again, a
20 statement made during that conversation to which the defendants
21 refer. They said that Balducci asked Judge Lackey whether he
22 thought the parties ought to arbitrate; and Judge Lackey said,
23 according to the defendants, "It does; it looks like that's
24 what they agreed to." Is that -- do you remember that
25 statement being made?

1 A. Yes, I do.

2 Q. All right. And tell the Court why you left that
3 particular statement out.

4 A. Well, prior to the judge making that particular statement,
5 he had actually told Mr. Balducci how he thought the case would
6 go. And in that instance, he thought the case would go to the
7 State Supreme Court. Mr. Balducci said, "Well, let me give you
8 my thoughts and ideas about it." He then went on a fairly long
9 explanation as to how he saw the case and how he thought it
10 should go. At the end of which, he said, "I think it should go
11 to arbitration, don't you, Judge?" And the judge said, "Well,
12 I agree"; but he never gave a definitive answer that that's how
13 he truly thought, and that's what he was going to do.

14 Q. Okay. All right. And then one more statement he made
15 on -- or to which the defendants refer, on May the 9th, that
16 Judge Lackey told Balducci he was -- he wanted to make certain
17 he was, quote, "going to get credit for the order." Do you
18 remember whether Judge Lackey said that?

19 A. Yes, that was in the conversation.

20 Q. All right. And why did you not put that statement into
21 the affidavit?

22 A. I didn't see where it was material. You had earlier where
23 the -- Mr. Balducci had approached the judge, talked to him
24 about this case at some length; at the end of which, he offered
25 a position of, of counsel when the judge was ready for it. The

1 judge clearly indicated to me that he felt that was a, you
2 know, at least, at the very least, improper overture to him, if
3 not rising to possibly criminal intent. Based on that, I put
4 much more weight into that incident than what Mr. Balducci said
5 on May 9th.

6 Q. Okay. All right. I want to move now to May 21st. Did
7 Balducci and Lackey speak together on May 21st?

8 A. Yes, they did.

9 Q. Okay. The defendants describe Judge Lackey's behavior as
10 aggressive, and they point to a particular statement Judge
11 Lackey made. He said, "I just want to hear you say it again.
12 You and Scruggs are the only ones who know anything about
13 this?" Do you remember that particular statement?

14 A. Yes.

15 Q. All right. They say that this omission thus conceals
16 Lackey's aggressive efforts to target Balducci. Was it your
17 opinion at that time that -- why did you leave that statement
18 out?

19 A. Again, Judge Lackey, when called on the 21st of May, he
20 started that whole conversation out by telling Mr. Balducci,
21 "I've never been involved in anything like this before." He
22 was looking for reassurances. Judge Lackey was terribly
23 troubled by this whole incident.

24 He was really conflicted for two reasons: A, he knew what
25 Mr. Balducci had done was wrong; but also, Mr. Balducci was a

1 friend of his for several years. And the judge was conflicted.
2 He knew what he needed to do; but by the same token, he was
3 conflicted. He didn't want to get his friend in trouble.

4 And I think that really kind of manifested itself on May
5 21st both with that phone call where he's clearly troubled, and
6 Mr. Balducci picks up on that pretty quickly, and then later
7 that day when he sends a recusal letter.

8 Q. Okay. I want to ask you about -- I'm still on May 21st.
9 Here's another statement I want to refer you to. Do you
10 remember Tim Balducci saying, "I don't mean to make you
11 uncomfortable. If it's not something you feel right about, you
12 do what your heart tells you. I've got complete confidence
13 that it's completely fine. I would never put you -- you nor
14 me -- in that position. I have complete confidence that it's
15 fine." Do you remember whether or not Balducci said that?

16 A. Yes, sir, he did.

17 Q. And why didn't you put that in the affidavit?

18 A. Again, I didn't give a lot of weight to it. Simply the
19 fact that my impression of that conversation, Mr. Balducci was
20 reacting to Judge Lackey's initial statement about him being
21 troubled; he'd never been involved in anything like this
22 before. He was looking for some reassurance. To me, it was
23 nothing more than Mr. Balducci trying to put the judge at ease,
24 trying to get him to, you know, deal with him in a position
25 that he would be more comfortable in.

1 Q. Okay. And then, finally, on the 21st, I believe, do you
2 remember Balducci saying this, "Frankly, Judge, I think we're
3 right; and I think that the law is on our side. And I think
4 probably had I never approached you, we'd probably had the
5 right result with us on this thing. My goal was simply to tell
6 you where -- that I had an interest in this thing and if I
7 could help guide you to where I thought this thing legally
8 could come." You remember that statement?

9 A. Yes, sir.

10 Q. And why was that not provided in your affidavit?

11 A. Again, I go back to Judge Lackey's initial statement on
12 that May 21st conversation. He was obviously troubled. And
13 also, I didn't give a lot of credence to -- you know,
14 Mr. Balducci had already approached the judge again back in
15 March and subsequent contacts in early May. He told him what
16 he wanted. I just didn't give a lot of credibility to what was
17 said in that particular conversation.

18 Q. And when was this affidavit signed, the initial Balducci
19 wire signed?

20 A. September 25th.

21 Q. And, so, you were aware, at that time, of events that took
22 place later?

23 A. Yes, sir.

24 Q. All right. The next thing the defendants point to with
25 their motion is the fact that -- you remember when Judge Lackey

1 recused himself from the *Jones v. Scruggs* case?

2 A. He sent a letter out May 21st after the phone call to
3 Mr. Balducci.

4 Q. Did he tell you -- did you talk to him before he recused?

5 A. No, I did not.

6 Q. All right. Why did you not include in the affidavit
7 anything about the recusal?

8 A. I didn't think it was pertinent to the case, you know, to
9 what we were looking at. Judge Lackey recused himself not
10 because what he was doing -- there was nothing criminal going
11 on or nothing wrong. Judge Lackey recused himself, from my
12 perspective, because he was troubled by this.

13 Like a lot of things that people do when they're -- things
14 bother them, they want to get away from them. He made that
15 decision to try and, you know, remove himself from this
16 problem; but he also realized after he did it that he really
17 wasn't solving anything; and that, ultimately, this issue of
18 whether what Mr. Balducci did was merely improper or if there
19 was criminal intent needed to be resolved. And he was -- he
20 needed to be involved in that process to finding that out.

21 Q. When he did recuse, did he contact you?

22 A. When he --

23 Q. After he recused?

24 A. When he sent in his subsequent letter saying he was coming
25 back in?

1 Q. No. I'm talking about after he recused. Did he contact
2 you?

3 A. The following day.

4 Q. And did you meet with him?

5 A. Yes, I did.

6 Q. And what did you tell him to do?

7 A. I discussed with him, basically, what the options were,
8 you know. He told me -- he didn't really give me any concrete
9 explanations, from what I recall, as to why he did it. I could
10 tell, again, this whole situation troubled him greatly. We
11 discussed possible options. He told me that, you know, the
12 door for him getting back in was not necessarily closed.

13 I don't remember specifically what he hadn't done to
14 finalize it. I think it may have been notify the Supreme
15 Court, but I'm not sure. But anyway, he indicated to me that
16 the door was not shut on him getting back into the case. We
17 talked about it; and when I left him that day, he had not made
18 a decision one way or the other what he was going to do, other
19 than he was just going to think about it.

20 Q. Were you demanding that he get back into the case?

21 A. No. No.

22 Q. All right. The next thing to which the defendants refer
23 is that your affidavit failed to disclose that Judge Lackey
24 repeatedly contacted Balducci from May until September. As I
25 said, they're describing Judge Lackey's behavior as aggressive.

1 Do you know how many times during the summer of 2007 -- do you
2 know how many times Judge Lackey contacted Tim Balducci?

3 A. I believe there was two or three contacts in June. I
4 don't believe there was any contact in July that I'm aware of.
5 And I think there was two more contacts in August.

6 Q. All right. During the summer of 2007, how many FBI agents
7 were working on this case with you?

8 A. Just myself.

9 Q. All right. Where were you during July?

10 A. I was gone for three out of the four weeks out of the
11 state.

12 Q. Okay. Were you working on any other cases besides this
13 case during this time period?

14 A. During the summer, yes, sir. I had several other cases,
15 to include cattle gate (phonetic).

16 Q. You were working on the case involving Mississippi Beef?

17 A. Yes, sir.

18 Q. How often would you meet or speak with Judge Lackey that
19 summer?

20 A. It was pretty infrequently. I believe I probably came
21 down -- if I was up here working on another case, I would come
22 down through Calhoun City and see him just to check on him.
23 Again, he was real troubled by this; and a lot of times, I just
24 came by to see how he's doing, see how he's holding up.

25 Q. Okay. I want to take you now to May 29th. Did Balducci

1 and Judge Lackey speak together -- speak to each other on May
2 the 29th of last year?

3 A. Yes, they did.

4 Q. All right. I want to read again the statement that the
5 defendants allege was made and ask if you remember this
6 statement. They're saying that Balducci says this to Judge
7 Lackey, "I damn sure didn't want you to do anything to
8 jeopardize my relationship with you. I didn't want to do
9 anything in the world to do that relationship any harm. I want
10 to make sure you and I are okay and that it would break my
11 heart if I thought I put you in a bad position. When you
12 called the other night, I could tell that you were troubled by
13 it." Do you remember that statement being made?

14 A. Yes, I do.

15 Q. Why didn't you include that?

16 A. Again, May 29th is shortly after the judge had recused
17 himself. Mr. Balducci knew he had recused himself. It is
18 clear to me, my impression, Mr. Balducci was concerned about
19 his actions; and he was trying to do anything he could or say
20 anything he could to the judge to try and remedy what he
21 thought was a misstep on his part.

22 Q. All right. Again, the defendants refer to Balducci
23 saying, with reference to the decision they were wanting Judge
24 Lackey to make, "If that's how you see it after you've taken a
25 look at it, if you see it that way, that would be terrific."

1 Do you remember that statement being made?

2 A. Yes, I do.

3 Q. And why did you not put that in the affidavit?

4 A. Same reason. Again, it's right after the recusal. It's
5 right after the phone call on May 21 where Balducci
6 acknowledges he can tell the judge is troubled. I think
7 Balducci is trying to placate the judge as much as possible,
8 trying to keep from a bad situation being worse.

9 Q. Okay. Just three more statements I've got with respect to
10 the September the 25th affidavit. The defendants refer to a
11 September the 18th conversation between Judge Lackey and
12 Balducci. And they point out that Judge Lackey told Balducci
13 that he -- quote, he wanted to -- quote, "help me get over a
14 little hump I've got." This is when he's discussing payment.

15 A. Uh-huh (yes).

16 Q. Do you remember that phrase, Judge Lackey using that
17 phrase?

18 A. I do.

19 Q. And why did you not put that phrase in the affidavit?

20 A. Because there were earlier conversation on September 18th
21 where Judge Lackey had talked about the Scruggs matter, and
22 that he wanted to help him; and basically asked him, said, "If
23 I'm willing to help them, would they help us?" And
24 Mr. Balducci's response was, "No question." And continued on
25 trying to figure out, you know, how he could do it.

1 I put much more weight into those comments, that
2 conversation, than I did, you know, over the hump.
3 Subsequently, I believe, also later in that conversation, that
4 comment that the judge made about getting over a hump was in
5 response to a question from Mr. Balducci about how badly he
6 needs the help or when he needs the help.

7 Q. So when Judge Lackey asked him to "help get me over a
8 little hump," you're saying that Balducci had already agreed to
9 pay the bribe by the time he said that?

10 A. Yes, that's my recollection.

11 Q. All right. On the 21st, Judge Lackey is speaking with
12 Balducci again and he says, "I could delay my misery; I think I
13 can get them to put it off." Do you remember whether Judge
14 Lackey said that to Tim?

15 A. Yes, he did.

16 Q. And why did you not put that phrase in the affidavit?

17 A. Much the same reason. Earlier in the conversation, they
18 had discussed the arrangement, the judge helping them out,
19 signing the order, sending it to arbitration in exchange for --
20 what they agreed on that day was \$40,000. They went so far as
21 trying to figure out how the arrangements could be made,
22 whether it was in cash, how quickly he needed it. To me, they
23 had already agreed to the deal. That line did not carry as
24 much weight as the earlier conversations as to the incident.

25 Q. All right. Okay. And then, finally, on September the

1 24th, do you remember Judge Lackey speaking to Tim Balducci and
2 saying, "Can I commit to my folks that are pressuring me
3 something by the weekend?" Do you remember that phrase?

4 A. I do.

5 Q. And why was that not included in the affidavit?

6 A. Same reason. Again, that was later in the conversation;
7 and actually, that comment from the judge was in response to a
8 question from Mr. Balducci and, again, I think asking how soon
9 he needed the money. Again, they had already agreed to what
10 the deal was going to be.

11 In this particular instance on September 24th, if I recall
12 correctly, the judge was returning a call to Mr. Balducci.
13 Mr. Balducci immediately, in the conversation, was trying to
14 set up an arrangement with the judge. He said, "I can come
15 down tomorrow. I can come down the next day." And the judge
16 is trying to set it up for later in the week. And, so, to me,
17 that was nothing more than the judge just trying to set
18 parameters when this deal could take place. The deal had
19 already been agreed to on a couple of different occasions.

20 Q. So it was your impression who was putting pressure on
21 whom?

22 A. In that particular phone call, it sounded like
23 Mr. Balducci was much more eager to get the deal done sooner
24 than the judge.

25 Q. All right. I now want to ask you about the affidavit from

1 October 16th.

2 MR. KEKER: Excuse me, Mr. Sanders. Your Honor,
3 could I suggest that maybe if I could examine on this
4 affidavit -- and we have this affidavit -- kind of put it to
5 bed in one place before we move on? I'm afraid they're all
6 going to get mushed up.

7 THE COURT: That may be preferable.

8 MR. KEKER: And I'll stop at --

9 THE COURT: All right.

10 CROSS-EXAMINATION

11 BY MR. KEKER:

12 Q. Good afternoon, Agent Delaney.

13 A. Good afternoon.

14 Q. Agent Delaney, you've said you're the case agent on this
15 case?

16 A. Yes, sir.

17 Q. And when were you assigned to it?

18 A. I'm sorry?

19 Q. When were you assigned to the case?

20 A. Early April, I believe. Early, mid-April.

21 Q. And you said one of the first things you did is interview
22 Judge Lackey?

23 A. Yes, sir.

24 Q. Do you remember when that interview was?

25 A. I believe it was around April 24th.

1 Q. Did Judge Lackey tell you then that he had waited two
2 weeks before reporting his conversation with Mr. Balducci?

3 A. No, sir. He didn't give me a frame as to when he had
4 reported it. He just said he reported it to the U.S.
5 Attorney's Office.

6 Q. Why did you put it in your declaration, that we're
7 referring to now as Exhibit 9 -- why did you put in your
8 declaration that it was at the conclusion of the meeting, then?

9 A. That was my understanding talking to the U.S. Attorney's
10 Office and talking to the judge, that it was shortly after
11 Mr. Balducci came down and met with him.

12 Q. Okay. So did Judge Lackey give you the impression --
13 leave you to understand that at the conclusion of the meeting
14 he went to the U.S. Attorney and said, "There's a problem
15 here"?

16 A. We didn't get into the time frame as to how quickly he
17 went and saw the U.S. Attorney's Office. He just indicated to
18 me that that's what he had done.

19 Q. Did you later learn that it was a two-week interval?

20 A. Yes, sir.

21 Q. Did you ask him about it?

22 A. He explained it to me.

23 Q. What did he explain? Tell us about that.

24 A. As what happened in that interim?

25 Q. Yeah.

1 A. He had talked to several different people after
2 Mr. Balducci's visit. Again, he was troubled. He didn't know
3 what to do. He talked to several different people soliciting
4 different people's advice. Ultimately, he decided the best
5 course of action was to contact the U.S. Attorney's Office.

6 Q. Did he tell you who he talked to?

7 A. He did. I don't know any of the individuals personally,
8 so I can't recall their names.

9 Q. Did he tell you that during this two-week period he was
10 sort of trying to figure out whether or not anything improper
11 had happened?

12 A. He just told me that he was discussing it with other
13 people and trying figure out what the best course of action
14 was.

15 Q. Did he tell you that he had a real question about whether
16 or not anything improper had happened?

17 A. No. He made it clear to me that he certainly believed
18 something improper had happened. It was just a question of
19 whether something criminal had happened.

20 Q. What did he tell you about this of counsel position?

21 A. He told me that he believed -- he took it, when
22 Mr. Balducci came down and talked about the civil case that he
23 was hearing -- that when Mr. Balducci, at the end of
24 conversation, offered him the position of, of counsel to him
25 Mr. Balducci was trying to say that if, you know, you help us

1 out on this case; when you're ready, I'll have a position in my
2 law firm for you.

3 Q. And that's the way Judge Lackey presented it, offer of
4 quid pro quo?

5 A. Yes, sir.

6 Q. So he had no question in his mind that he had been bribed?

7 A. No, sir. There was no -- see, there was no question that
8 he had been bribed. That was the whole crux of this thing. He
9 knew something improper had happened, but he didn't know for
10 sure if something illegal had happened.

11 Q. So Judge Lackey didn't know whether or not someone had
12 offered to bribe him?

13 A. Say that again, sir.

14 Q. Judge Lackey, after this first meeting with Mr. Balducci,
15 spent two weeks trying to figure out what to do about it?

16 A. Uh-huh (yes).

17 Q. And he didn't know, during that two-week period, that he
18 had been bribed?

19 A. He didn't know whether, you know, what had happened with
20 Mr. Balducci rose to the level of a criminal action, no. That
21 was the whole point of contacting the U.S. Attorney's Office
22 and bringing our office in to determine if that in fact had
23 happened or would happen.

24 Q. So what you did is set up recording equipment in his
25 office to get to the bottom of it?

1 A. Basically to make it -- to find out if that in fact had
2 happened, whether it was just an improper overture by
3 Mr. Balducci or was it more.

4 Q. When did you set up recording equipment in Judge Lackey's
5 office? And by you, I mean the Government.

6 A. The first time we tried to made a recorded conversation
7 was May 3rd.

8 Q. When did you set up the recording equipment?

9 A. I'm not sure when -- what you mean by *set up*. I gave him
10 a telephone recorder on May 3rd.

11 Q. Was there a call with Mr. Balducci on May 3rd?

12 A. Yes, there was.

13 Q. And was that call recorded?

14 A. It was -- the only thing that was successfully recorded
15 was the preamble.

16 Q. And what was the preamble?

17 A. Just basically the judge identifying who he was, who he
18 was calling, the time, the date, the numbers he was calling
19 from and calling to, from what I recall.

20 Q. And, so, he talks into this recording machine; and we've
21 been told that there's no recording of this.

22 A. That's correct.

23 Q. You're telling me there was a recording, but it
24 malfunctioned some point?

25 A. The only thing that was captured on tape was preamble.

1 The actual content of the conversation between Judge Lackey and
2 Balducci was not captured.

3 Q. Who had control over that recording device on May 3rd to
4 determine whether or not a call would be recorded or not?

5 A. I gave the recording -- actually, Judge Lackey used his
6 own recording device on that instance.

7 Q. Oh, so you didn't give --

8 A. I gave him one; he elected to use his own in that
9 particular incident.

10 Q. And he didn't record the call on May 3rd?

11 A. It was not successfully recorded, no.

12 Q. Did he report to you about that?

13 A. Yes. I was in the office with him.

14 Q. During the call?

15 A. Yes, sir.

16 THE COURT: Mr. Keker, the area of inquiry that has
17 been established for this testimony is to examine what you have
18 alleged were misleading or false statements that were not put
19 in the affidavit. Please stick to that area.

20 MR. KEKER: And forgive me if I got afield.

21 BY MR. KEKER:

22 Q. As I understand your testimony, every one of the omissions
23 that we have alluded to was done on purpose; you did it
24 intentionally?

25 A. I won't say it was done intentionally. I weighed what

1 information I had in front of me, and I tried to make the best
2 decision I could based on what I believe was probable cause
3 that Mr. Balducci was using his phone to conduct a criminal
4 conspiracy.

5 Q. And to the extent that the information before you didn't
6 fit into what you thought established probable cause, you chose
7 to leave it out?

8 A. No.

9 Q. Well, I think you said something about, you just didn't
10 see much credibility with what he said; and therefore, you left
11 it out. Another time you said, you didn't think it carried
12 much weight; and you left it out. All the exculpatory material
13 you left out?

14 A. I explained myself why I left it out. There was
15 obviously, in my view, reasons why Mr. Balducci said those
16 things.

17 Q. Okay. Then let's go through some of them. May 4th, the
18 first call that's recorded, you left out deliberately that he
19 referred to this order that he'd sent down as "just some
20 thoughts, ideas, suggestions, I thought I'd put it on paper,
21 see if His Honor might be interested in it"?

22 A. Uh-huh (yes).

23 Q. And you left that out because you didn't think it
24 supported probable cause?

25 A. Again, earlier in the day, he had sent a fax to the judge,

1 unsolicited, with an order with a signature line on it. I give
2 more weight to that action than what Mr. Balducci said. To me,
3 it was clear that -- to me what Mr. Balducci wanted was the
4 judge to sign and enter that order rather than just trying to
5 give him some thoughts and ideas about the case.

6 Q. There wasn't any mention in that phone conversation about
7 an *of counsel* position, was there?

8 A. No, sir, there wasn't.

9 Q. And what you said in your affidavit was that there had
10 been mention of an *of counsel* position in the May 3rd
11 unrecorded call?

12 A. Correct.

13 Q. And in your affidavit, you quoted what was said in the May
14 3rd call. And would you agree that your affidavit gives the
15 impression there was a recording with that May 3rd call?

16 A. That was taken from a statement provided to me by the
17 judge. The judge wrote out a statement after the May 3rd
18 recording.

19 Q. Okay. And you were quoting from his statement?

20 A. Yes, sir.

21 Q. Okay. And you didn't consider it misleading that you were
22 quoting and implying that it was recorded?

23 A. I don't think it says in the affidavit that it is from a
24 recording. It's quoted from a -- it's quoted from Judge
25 Lackey's statement that he gave to me.

1 Q. Let me jump ahead, then, to May 9. We're still trying to
2 determine -- you and Judge Lackey are trying to determine if
3 Mr. Balducci is a criminal. You left out that there was no
4 discussion of -- you didn't say anything, but there's no
5 discussion of money, no discussion of the of counsel position
6 in that call, right?

7 A. Not that I recall. Well, I take that back. I believe
8 Mr. Balducci spoke about some of the people he did bring in --
9 had brought in recently as of counsel; and I'm not sure if he
10 specifically said, "Judge, again, we'd like to have you of
11 counsel"; but that was the -- my interpretation of the intent
12 of that, of that whole litany, was to say that we've got room
13 for you; we'd like to have you in there.

14 Q. And at the end of the conversation, he says -- Judge
15 Lackey said, "It looks like they deserve to have the case go to
16 arbitration," or words to that effect; and you left that out
17 deliberately, right?

18 A. I don't think he said that, sir. I think what he said,
19 "Looks like they agreed to it." But again, as I said earlier,
20 before Judge Lackey had said that, he had told Mr. Balducci
21 that he thought the case was going to the Supreme Court. He
22 was reacting in that particular statement, which you reference
23 in your motion, he was reacting -- the judge was reacting to a
24 question that Mr. Balducci posed to him. He answered it. He
25 didn't answer it completely. He just said, "Yeah, sort of

1 looks like what they agreed to." But he didn't say, "I agree
2 with it; that's how I'm going to act," or any other.

3 Q. Agent Delaney, you are an FBI agent; and in substance,
4 you're being paid to look at the world through dirty windows;
5 isn't that true?

6 A. I'm not sure what you mean by *dirty windows*.

7 Q. Well, you cast a suspicious eye on human transactions to
8 see if there's anything illegal about it, right?

9 A. If allegations are brought to me, my job is to try to
10 figure out whether they're true or not.

11 Q. Did you understand that the job of the judge -- remember
12 the judicial branch -- in evaluating the affidavit from a law
13 enforcement officer is to try to look at it fair and square and
14 call the chips -- look at it fair and square, look at all the
15 information and make a decision?

16 A. Yes, sir.

17 Q. And did you understand that you were filtering out
18 exculpatory information so the judge wouldn't have that to look
19 at?

20 A. Again, I put down in that affidavit what I thought was the
21 best probable cause regarding Mr. Balducci's use of his
22 cellular telephone in a criminal case.

23 Q. Did you tell the judge that as of May 9 they -- the
24 judge -- Balducci had talked to Judge Lackey, and Judge Lackey
25 says, "It looks like that's what they agreed to"? There was no

1 discussion about doing anything further with respect to
2 anything. Did you tell the judge that it was over on May 9th?

3 A. No, I did not put that in my affidavit, if that's what
4 you're asking me.

5 Q. And then on May 21, Judge Lackey started calling
6 Mr. Balducci again, right?

7 A. He called him, yes, sir.

8 Q. Did you tell him to call him?

9 A. I was not present for that call.

10 Q. Did you tell him to call?

11 A. (No response.)

12 Q. Or suggest?

13 A. I'm sure we discussed having him call, yes.

14 Q. And did he call him once -- he called him twice; and
15 finally, he got him the third time. And Mr. Balducci assured
16 Judge Lackey that nobody other than Balducci and Scruggs knew
17 the arrangements suggested by Balducci.

18 You put that in; but then you omitted that it was Judge
19 Lackey that was bringing that up; that Balducci said a number
20 of times he didn't want the judge to do anything improper; that
21 Balducci said to Judge Lackey, "You do what you feel
22 comfortable with, and I don't mean to make you uncomfortable,
23 if it's not something you feel right about. You do what your
24 heart tells you. I've got complete confidence that this is
25 completely fine. I would never put you or me in that position.

1 I have complete confidence that it's fine." You left that out
2 of your affidavit, right?

3 A. Yes, sir.

4 Q. And you did it on purpose?

5 A. No, I did not do it on purpose. I did it, again,
6 reflecting over the content of the call and the fact that the
7 judge calls up, he's troubled. Mr. Balducci picks up that he's
8 troubled. I believe the judge starts out the conversation
9 with, "I've never been involved in anything like this before.
10 I'm looking for reassurance." My impression, that's what
11 Mr. Balducci was doing; he was reacting to that comment of the
12 judge and trying to reassure the judge.

13 Q. You said earlier he was trying to put the judge at ease?

14 A. Yes, sir.

15 Q. And you didn't put that in your affidavit so that the
16 judge evaluating probable cause would know that?

17 A. No, I didn't.

18 Q. Why didn't you do that?

19 A. Why didn't I put that the judge was not at ease?

20 Q. Why didn't you put that Balducci's making all these
21 professions of innocence, trying to put the judge at ease and
22 make everything go away, basically?

23 A. But he never did say, Look -- he said -- he was trying to
24 put the judge at ease; but he never said, "Look, Judge, you
25 misunderstood me. I didn't mean to influence you in this way.

1 And, you know, I don't want to -- you know, we don't need to
2 talk about this anymore; and I apologize." It never went that
3 far.

4 Q. But he said, "You do what you feel comfortable with. I
5 don't mean to make you uncomfortable. If it's something that
6 you feel right about, you do what your heart tells you."

7 What's the difference, Agent Delaney?

8 A. The difference is he's telling him what to do; he's not
9 stopping -- you know, he's not saying, What happened in the
10 past was wrong. He's not trying to stop what is happening then
11 or what may happen in the future.

12 Q. You didn't put in the affidavit what he said on May 21st,
13 and this is all right before Judge Lackey gets out of the case
14 because he's being earwigged by the other side. Balducci says,
15 "Frankly, I think we're right; and I think the law's on our
16 side. And I think probably had I never approached you, we'd
17 have probably had the right result for us on this thing. My
18 goal is simply to tell you where I had an interest in this
19 thing and help guide you to where I thought this thing legally
20 could come." You left that out, too?

21 A. Yes, sir.

22 Q. And then you omitted, he recused himself that same night
23 or day?

24 A. Yes, sir.

25 Q. And you left that out of the affidavit?

1 A. Yes, I did.

2 Q. But you also left out of the affidavit -- who called whom
3 the next day? You got together with him the next day?

4 A. Yes, I did.

5 Q. And you told him to get back in there?

6 A. No, sir, I didn't.

7 Q. Why did you get together with him the next day?

8 A. I believe he called me to tell me that he'd made that
9 phone call to Mr. Balducci and that he was recusing himself.

10 Q. Well, he filed a form on the 21st, right?

11 A. I'm sorry?

12 Q. He filed a form recusing himself, a formal recusal?

13 A. My understanding is he faxed the letter on the 21st.

14 Q. And he called you and told you about it?

15 A. On the 22nd.

16 Q. And you talked him into getting back in the case?

17 A. No, I did not. He made that decision on his own.

18 Q. Did you and Judge Lackey talk about the fact that up to
19 now, at least, you as a professional agent and he as a judge,
20 nothing criminal had happened; there's no case?

21 A. No. We -- in that particular instance, from what I
22 recall, we discussed his recusal, his possibility of getting
23 back in. We talked about the different options. And again,
24 from what I recall, at the end of meeting with him, he had not
25 made up his mind what he was going to do. He said he would

1 think about it.

2 Q. So when did you learn that he was going to get back in the
3 case?

4 A. Less than a week later, I believe.

5 Q. Okay. And the first thing you did when you learned he was
6 going to get back in the case, you came up and wired up this
7 judge in circuit court; and you sent him up to New Albany to
8 have lunch with Tim Balducci, right?

9 A. No, that was not the next thing.

10 THE COURT: Counselor, now --

11 MR. KEKER: I'm sorry, Your Honor.

12 THE COURT: Stick with what we've talked about.

13 BY MR. KEKER:

14 Q. Did you say anything in the affidavit about the fact that
15 you wired him up and sent him to New Albany to have lunch with
16 Tim Balducci?

17 A. No, I did not.

18 Q. And did you say anything in the affidavit about the fact
19 that at that lunch nothing -- Balducci, despite being alone in
20 the car with Judge Lackey not once but twice, said nothing
21 about the *Jones* case or about *of counsel* or any of this?

22 A. No, I didn't.

23 Q. And did you say anything in the affidavit about the fact
24 that you wired him up again on June 28 and directed him to go
25 to the Balducci office?

1 A. No, I did not.

2 Q. But you did do that; you did wire him up and send him to
3 the Balducci office?

4 A. I gave him a body recorder; and, yes, he did.

5 Q. And again, nothing happened; you didn't say anything about
6 that in the affidavit?

7 A. No, I did not.

8 Q. At any point, did Judge Lackey say to you, you know, "I'm
9 getting nervous about this motion that's been pending since
10 March 19th"?

11 A. No. We discussed that. Actually, I brought it up more
12 than he did; and he assured me it was fine; he'd be able to
13 take care of it.

14 Q. Did you put into your affidavit that during your -- I
15 guess you were on some kind of military leave during --

16 A. No, sir, I was not on military.

17 Q. But you were out of state in July?

18 A. Yes.

19 Q. And Judge Lackey held a hearing in the Jones case to
20 decide the motion to arbitrate? Did you know that?

21 A. I believe I learned of that later.

22 Q. And there's nothing in the affidavit about that or about
23 the fact that he still wouldn't issue an order one way or the
24 other?

25 A. No, sir.

1 Q. And then there's nothing in the affidavit about -- well,
2 did you ask Judge Lackey when you got back in August to start
3 making calls to Balducci?

4 A. I mean, I -- no. Did I continually direct him to make
5 calls? No. It was understood from the beginning that if
6 Mr. Balducci contacted him, he was, you know, to try and record
7 the conversation or, if not, call him back and record the
8 conversation. I wasn't directing him when to make the calls or
9 anything like that. That was pretty much up to Judge Lackey.

10 Q. And did you know that he tried to contact Mr. Balducci on
11 August 3rd, but Mr. Balducci didn't call him back?

12 A. Yes, sir.

13 Q. And did you put that in the affidavit?

14 A. No. I believe actually what happened is he called and he
15 wasn't there, and he didn't leave a message for him to call
16 back.

17 Q. And Mr. Balducci didn't call him back?

18 A. No, he didn't; but he didn't ask him to call him back
19 either.

20 Q. And did you put in the affidavit that he called him, Judge
21 Lackey called Balducci on August 9?

22 A. That's not in the affidavit, no.

23 Q. And did you say that Judge Lackey was trying to implicate
24 Dick Scruggs in that conversation by asking, "You think Dickie
25 wants this thing to go to mediation and arbitration"? He

1 brings up Scruggs's name just gratuitously?

2 A. No, it's not in the affidavit.

3 Q. And did you put in the affidavit that on August 9 Balducci
4 told Lackey -- Judge Lackey's just had a hearing -- to decide
5 the motion how he sees it? "If that's how you see it after
6 you've taken a look at it, if you see it that way, that'd be
7 terrific."

8 A. That's not in the affidavit.

9 Q. But it happened, didn't it?

10 A. Yes, it did.

11 Q. And then on August 27, Judge Lackey called Mr. Balducci
12 twice; and Balducci didn't call him back. And you didn't
13 mention that in the affidavit, did you?

14 A. No, sir.

15 Q. And on September 11th, Judge Lackey same thing, called him
16 twice, leaving messages; and Balducci didn't call him back.

17 A. I believe Mr. Balducci may have been out of town on that
18 particular instance.

19 Q. But you didn't say in your affidavit --

20 A. No, it's not in the affidavit.

21 Q. Then you said you were stopping by to see Judge Lackey.
22 How many times do you think you stopped down at Calhoun City to
23 see Judge Lackey?

24 A. I couldn't give you an accurate number, sir.

25 Q. On September 18 -- you talked about September 18, said

1 something about they mentioned a hump and all that business.

2 That wasn't September 18. That was September 21st, wasn't it?

3 I don't want to confuse you.

4 A. Without looking at the transcript -- I think it was

5 September 18; but without looking at the transcript, I don't

6 know for sure.

7 Q. On September 18, Mr. -- Judge Lackey said to

8 Mr. Balducci -- first of all, who called whom on September 18?

9 It was Judge Lackey calling Balducci, correct?

10 A. I believe that's correct.

11 Q. And let me give you the transcript if you want to use it

12 to refresh your recollection.

13 A. Thank you.

14 MR. KEKER: Would you like a copy, Your Honor?

15 THE COURT: No.

16 MR. KEKER: This is Exhibit 12 to the Dooley

17 declaration.

18 BY MR. KEKER:

19 Q. September 18 is not the call where he says he's got to get

20 over the hump, is it?

21 A. Okay. Are you asking me?

22 Q. Yeah. I just want you --

23 THE COURT: What are you asking him to look at?

24 MR. KEKER: I'm asking him to look at the transcript

25 we've been provided.

1 THE COURT: I know that, but what part.

2 MR. KEKER: On September 18, to see if his testimony
3 on direct was mistaken, that this is not the call where he
4 talks about "I've got to get over a hump." That happened three
5 days later, and I think Agent Delaney --

6 THE WITNESS: I don't see it in here.

7 BY MR. KEKER:

8 Q. So -- but that is the conversation where Judge Lackey says
9 Grady -- meaning Grady Tollison, the opponent in the *Jones v.*
10 *Scruggs* case -- is putting some pressure on him?

11 A. September 18.

12 Q. Did you talk to Judge Lackey to get an understanding what
13 that pressure was?

14 A. I don't recall talking to Judge Lackey about that, no.

15 Q. Where did the idea on September 18 to ask Balducci what
16 could be done -- what can you do for me or what can they do for
17 me, where did that idea come from?

18 A. That idea came from -- that was sort of the idea from the
19 very beginning, again, to find out which way this thing was
20 going to go. Is it just an improper overture or something
21 criminal in nature that occurred? Again, I go back to the
22 judge was very, very troubled over this. He didn't want to get
23 his friend in trouble. Let me finish, please.

24 It took Judge Lackey virtually the entire summer -- from
25 my perspective, it took him the entire summer to realize he

1 needed to get this thing resolved; we needed to get this thing
2 resolved. And the only way to get it resolved was for him to
3 broach that question to Mr. Balducci in sort of the form that
4 he did.

5 Q. Did you say in the affidavit that you filed in September
6 that for six months of calling and visiting and transcribed
7 calls Balducci had not even given a glimmer that he was talking
8 about a bribe?

9 A. Again, the judge -- early on in that first meeting, back
10 in March, the judge believed that that overture where he talked
11 about the case and then later of counsel was a possibility that
12 a bribe did exist.

13 Q. Did you say in the affidavit that from March to
14 September 17 there had never been a hint from Mr. Balducci or
15 anybody else that they were talking about money bribe to
16 Judge --

17 A. No, that did not come up. That does not eliminate the
18 fact of what happened on March 28.

19 Q. So was it -- whose idea was it to raise the issue of a
20 money bribe in September after this six months of silence?

21 A. Again, it was not the issue of -- the idea of whether it
22 was a money bribe was not the initial thing. It was framing
23 the question in such a way, without putting any kind of
24 tangible value on it, to see what Mr. Balducci's reaction would
25 be; and that's what he did.

1 The judge told me in early September, he said, "Look, we
2 need to find out one once and for all what is going on here";
3 and that's what we decided to do, to have him ask Mr. Balducci
4 in the manner that's recorded in this conversation on the 18th
5 of September.

6 Q. The 18th -- and he asked him -- and Balducci's reaction
7 was --

8 MR. SANDERS: Your Honor, we're now getting into -- I
9 think the affidavit was September 25th. I thought we were
10 getting into what took place after the 25th.

11 MR. KEKER: No. No, still September 18th
12 conversation. I want to make sure this part is clear. On
13 September 18 --

14 THE COURT: Limit it to what you've alleged was
15 omitted from the affidavit or what you allege was in the
16 affidavit that was materially misleading and why he did that.
17 That's what this examination is about.

18 BY MR. KEKER:

19 Q. Did you put in the affidavit that in response to a
20 suggestion by the judge that they do something for him? Did
21 you put in the affidavit that Mr. Balducci did not offer to do
22 anything for him, did not come back with any concrete proposal?

23 A. I put in the affidavit the contents of that conversation
24 from September 18.

25 Q. Well, you didn't put in all the contents, did you?

1 A. No, I didn't.

2 Q. And you didn't put in the fact that he did not come back
3 and say, yeah, we will do X, Y, Z.

4 A. There was nothing definitive decided on October -- I'm
5 sorry -- September 18th, other than the fact that the judge
6 asked, "If I help them out, will they help me out" and
7 Mr. Balducci -- I believe his response was, "No question, I
8 think they will."

9 Q. But he also said, "You go think on it, Balducci, and come
10 back and tell me what you've got to offer," words to that
11 effect?

12 A. I don't know what the exact words are. Can I look at the
13 transcript?

14 Q. Sure. But you know -- he did not -- he tried to leave it
15 with Balducci, and Balducci didn't respond with any kind of
16 specific quid pro quo.

17 A. No. There was no specific deal done on September 18th.
18 It was strictly, as I said, he asked if I would help them,
19 would they help me; and he was told he thought he would.

20 Q. Did you point out in the affidavit, to the magistrate
21 deciding whether or not to issue the wiretap, that after three
22 days Judge Lackey was the one who had to come up with a
23 specific quid pro quo, namely \$40,000?

24 A. I believe on the 21st Mr. Balducci asked him what he was
25 referring to.

1 Q. And that's when the judge raises the issue of money?

2 A. Yes.

3 Q. And talks about the hump he has to get over and the
4 problems in his private life?

5 A. He talks about the hump he has to get over after
6 Mr. Balducci agrees to the 40 in discussing how they're going
7 to do it and saying he's the one to do it.

8 Q. The transcript will speak for itself.

9 MR. KEKER: That's all I have on this, Your Honor.

10 THE COURT: All right. Any redirect?

11 MR. SANDERS: Yes, Your Honor.

12 REDIRECT EXAMINATION

13 BY MR. SANDERS:

14 Q. There was some conversation about the September 18th and
15 the September 21st when Judge Lackey said "to get him over a
16 hump." Did Judge Lackey discuss getting over a hump both
17 times? Do you recall?

18 A. I think on the 18th. I'm not sure if he used the exact
19 term *getting over a hump*, but I think he'd indicated he'd had
20 some problems.

21 Q. All right. If I hand you the transcript from
22 September 18th, would it refresh your recollection? You may
23 still have it.

24 A. I have it.

25 Q. If you look at page 8, do you think that would refresh

1 your recollection?

2 MR. KEKER: Your Honor, I'm embarrassed to say what I
3 handed him were excerpts and not the full transcript. I'm not
4 sure if --

5 THE WITNESS: There is no page 8.

6 MR. SANDERS: May I approach, Your Honor?

7 THE COURT: All right. You may hand him the
8 transcript.

9 MR. SANDERS: Okay.

10 THE COURT: Give Mr. Keker back his excerpts.

11 THE WITNESS: Yes, he does. He does say that it's my
12 make and my hump, can't blame anybody else.

13 BY MR. SANDERS:

14 Q. Okay. I just wanted to clear that up. He asked you about
15 May the 4th. Again, he asked you about the thoughts, ideas
16 that Balducci was referring to?

17 A. Yes, sir.

18 Q. What specific document was Balducci referring to when he
19 talked about the thoughts, ideas on paper?

20 A. He was referring to that May 4th order that he'd faxed
21 down to Judge Lackey earlier in the morning.

22 Q. All right. And now he asked you, too, on May 4th whether
23 or not Balducci refers to of counsel. Did he on May 4th?

24 A. No, not that I recall.

25 Q. Did he on May 3rd?

1 A. Yes, he did.

2 Q. And did he on May 9th?

3 A. I believe he did.

4 Q. All right. And again, the statements Balducci is making,
5 that I think everything is fine, this order is fine, I think
6 this is probably right, those statements he made, what was your
7 impression of those statements; and why did you not put those
8 statements in the affidavit?

9 A. Again, to me -- which date are we talking about, May --

10 Q. The 21st of May.

11 A. Oh, the 21st. Again, those statements, to me, were
12 clearly made in response to the judge's first comment during
13 the conversation that, "Look, I've never been involved in
14 something like this." He's clearly troubled. Mr. Balducci
15 picks up on the judge is clearly troubled. And Mr. Balducci
16 clearly is trying to put the judge at ease and trying to assure
17 him that everything will be okay.

18 Q. Everything will be okay meaning what?

19 A. That nobody else is going to find out, that they'll be
20 able to do -- you know, if the judge does what they're asking
21 him to do, that there won't be any problems as a result of it.

22 Q. Okay. Also, you said that Tim never said anything like,
23 "No, you misunderstood this, Judge" something to that effect.
24 What would you have done if he'd said something like that?

25 A. If Mr. Balducci had made it clear that the judge was

1 mistaken in his overtures in March or early May and relay that
2 to me, if it was on tape, then I probably would have approached
3 Mr. Balducci, interviewed him, tried to find out exactly what
4 his intentions were. Based on that, I may have gone and
5 interviewed Mr. Scruggs; but certainly, I would have talked to
6 Mr. Balducci.

7 Q. And finally, you mentioned once -- you said that Judge
8 Lackey had -- Mr. Keker did -- he said that Judge Lackey
9 recused because he was being earwigged by the other side. You
10 said you met with Judge Lackey after he recused. Was that why?

11 A. No. He recused himself because he was terribly troubled
12 by this.

13 MR. SANDERS: Your Honor, I don't have any more
14 questions for this agent on the September 25th wiretap.

15 THE COURT: All right. You may step down.

16 MR. KEKER: Your Honor, may I ask him one question
17 about the September 25?

18 THE COURT: Was it anything that came out on cross?

19 MR. KEKER: Well, it's the date.

20 THE COURT: You may ask him about any question that
21 came out on cross-examination.

22 MR. KEKER: This is something that -- I wouldn't say
23 it came -- this has to do with the affidavit and the date.

24 THE COURT: One question.

25 MR. KEKER: One question.

RECROSS EXAMINATION

BY MR. KEKER:

Q. What date was your affidavit signed? I'm showing you Exhibit 9.

A. September 25th.

Q. Okay. And whose dating is that?

A. That's mine.

Q. And that says 25?

A. Yes, sir.

Q. Okay. Thank you.

MR. SANDERS: Your Honor, no further questions as far as the September 25th affidavit.

THE COURT: Okay. You may step down. We'll call you back out in a couple of minutes.

THE WITNESS: Thank you, sir.

THE COURT: All right. We'll be in recess ten minutes.

(AFTER A SHORT BREAK, THE PROCEEDING CONTINUED)

(CALL TO ORDER OF THE COURT)

THE COURT: All right. There's also an affidavit for a wiretap on -- I believe it was October 16th on Patterson's phone; is that correct?

MR. KEKER: Yes, Your Honor.

THE COURT: Is that your next one?

MR. SANDERS: Yes, sir, Your Honor.

1 THE COURT: Now, there's a question we haven't taken
2 up yet. There hasn't been any question raised about standing
3 for the defendants in this case to complain about a wiretap on
4 somebody else's phone. Of course, there was no wiretap ever on
5 Mr. Scruggs elder, Mr. Zach Scruggs, or Mr. Backstrom's phone.
6 So their phones were never tapped.

7 So I understand there's no law that's clear that an
8 aggrieved party can complain about if evidence on a wiretap of
9 somebody else's phone is used against a third person -- or a
10 second person from the phone, owner of the phone, then that
11 aggrieved person has a standing to complain about it. But the
12 question that I'd like to hear from counsel on is if there was
13 no information gained from the wiretap on Mr. Balducci's phone
14 from September 25th, I believe is when it was issued, until the
15 renewal of that wiretap -- which was, what, 30 days later?

16 MR. SANDERS: Yes, sir.

17 THE COURT: Thirty days later. Was there any
18 information during that thirty-day period that any of these
19 three defendants can claim they are aggrieved by, Mr. Keker?

20 MR. KEKER: I believe so, Your Honor. October 18,
21 Mr. Backstrom is on one of the calls. And it's also our
22 position that calls on a wiretap into a premises, owners of the
23 premise have standing. We've briefed that piece.

24 THE COURT: If they're aggrieved by the results.

25 MR. KEKER: Yes, sir. And then it's also our

1 position that this is cumulative, that the first one leads to
2 the second one, leads to the third one, sort of the taint runs
3 all the way through. The search warrant eventually is based on
4 the fruits of these wiretaps. So for all these reasons, they
5 have standing.

6 And then just to anticipate, Mr. Patterson's phone --
7 Mr. Dick Scruggs and, I think, Mr. Patterson -- but I'm not
8 sure about that. But I know Dick Scruggs is on the Patterson
9 tap that we'll get to later on.

10 THE COURT: All right. You may proceed. Evidently,
11 the Government's not concerned with that issue then, are you?
12 You haven't brought it up.

13 MR. SANDERS: That's right. Your Honor, first, we're
14 aware that the Government doesn't waive standing. The
15 Government cannot waive standing. In this instance, frankly,
16 Your Honor, we looked at the information; we looked at the law
17 out there. We knew if a party was aggrieved they had standing,
18 and it's certainly our position that the defendants are
19 aggrieved by the information elicited from the wiretaps.

20 THE COURT: Well, the question I brought up was
21 whether they were aggrieved by this 30-day period from which
22 the first wiretap was issued till 30 days later when it was
23 renewed.

24 MR. SANDERS: Yes, sir.

25 THE COURT: And probable cause or information had to

1 be presented at that renewal that would point toward the --
2 that would justify the renewal of it. So evidently, you're not
3 concerned with any standing of these three defendants to object
4 to information that was gained from this first 30-day period
5 where Mr. Balducci's phone was wiretapped?

6 MR. SANDERS: Your Honor, as I said, we don't believe
7 we waived it; and we may well address it at a later time. At
8 this point, however, we see the case law saying that if a
9 person is aggrieved -- and we believe that, for instance, on
10 October 18th, all three defendants were greatly aggrieved by
11 information elicited from the wiretap.

12 THE COURT: Okay. That would be within the thirty
13 days.

14 MR. SANDERS: Yes, sir.

15 THE COURT: All right. Good. All right, Mr. Kecker.

16 MR. KEKER: Your Honor, if we're going to go back to
17 Mr. Sanders to elicit information and I cross, that's all
18 right. Otherwise, I'll do it.

19 THE COURT: It's up to you gentlemen.

20 MR. KEKER: I'll do it either way, Mr. Sanders.

21 MR. SANDERS: Your Honor, do you want argument now on
22 the September 25th?

23 THE COURT: No. Do you want to go forward with the
24 second affidavit?

25 MR. SANDERS: Yes, sir.

1 THE COURT: All right. You may proceed.

2 DIRECT EXAMINATION

3 BY MR. SANDERS:

4 Q. Okay. Mr. Delaney, I am going to talk to you now about
5 the Patterson wiretap. The affidavit was signed -- when did
6 you sign the affidavit for the Patterson --

7 A. I believe it was October 16th.

8 Q. All right. They refer in their motion to three different
9 statements made, and I'm going to read those statements to you
10 and have you explain to us why they weren't contained in the
11 Patterson wiretap. The first one they talk about is that you
12 put in the affidavit that Patterson's talking to Balducci, and
13 you point out that P.L. Blake -- that Patterson has spoken to
14 P.L. Blake. And you said that he's already talked to P.L. and
15 that P.L. knows the amount.

16 A. Uh-huh (yes).

17 Q. Did P.L. Blake -- did Patterson also tell P.L. Blake on
18 the telephone call that P.L. doesn't know what it's about or
19 anything?

20 MR. KEKER: I think it was misspoken. It was a phone
21 call not with P.L. Blake but with Patterson Balducci.

22 BY MR. SANDERS:

23 Q. That's right. It's Patterson and Balducci. And does
24 Patterson tell Balducci that P.L. knows the amount of the
25 bribe? Do you remember that?

1 A. Yes, sir.

2 MR. KEKER: Well, I object because he didn't say he
3 knows the amount of the bribe. Does P.L. know the amount is
4 all he said, nothing said about the bribe.

5 MR. SANDERS: I'm sorry. I'll rephrase, Your Honor.

6 THE COURT: Okay.

7 BY MR. SANDERS:

8 Q. Did Patterson tell P.L. the amount?

9 A. Yes.

10 Q. Did Patterson also tell Balducci that P.L. doesn't know
11 what it's about or anything?

12 A. Yes, he did. I believe that's on the transcript of the
13 call.

14 Q. All right. Why did you not put that in the October 16th
15 affidavit?

16 A. Again, I'm trying to establish probable cause that
17 Mr. Patterson is aware of the conspiracy and using his phone in
18 connection with the conspiracy. We used the elements of that
19 call where he said he knew the amount. In a subsequent call, I
20 believe on October 10th, where, again, it's Mr. Patterson
21 speaking with Mr. Balducci. Mr. Patterson's asking
22 Mr. Balducci when the order's going to be sign, and he says
23 P.L. wants to know. I took those two phone calls to establish
24 the probable cause that Mr. Patterson and Mr. Blake had reason
25 to believe that they were involved in this conspiracy.

1 Q. Based on the September 27th and the October 10th call?

2 A. Yes, sir.

3 Q. All right. They also refer to a September 27th call
4 between -- or I think it's a conversation between Balducci and
5 Judge Lackey. All right? And this is -- I'll try to
6 paraphrase this, but it's essentially there's a statement
7 Balducci makes -- he says to Judge Lackey, "There ain't another
8 soul in the world that knows about this, okay? And this is --
9 this is -- this is taken care of."

10 And then later, Balducci says -- Lackey asks, "When you
11 tell Mr. Scruggs or Dickie or whatever I ought to call him --
12 you tell him that this is a first-time venture with me." And
13 then Balducci says, "He's not even involved at that level,
14 Judge." Balducci goes on to say, "The way this will work is
15 I'll just go to him at some point in time and say that I cured
16 a problem that you had, and you need to recognize the problem
17 that I have cured. That's how it works." Do you remember
18 those statements, Balducci speaking to Judge Lackey?

19 A. I do.

20 Q. And why were those statements not included in the
21 October 16th affidavit?

22 A. Again, I didn't give those statements as much weight as I
23 gave previous statements. Earlier on the 27th, we intercepted,
24 I believe, two calls on Mr. Balducci's phone. I believe one
25 with Mr. Patterson, and I believe the other one was Mr. Biden

1 (phonetic); I'm not sure. Mr. Balducci says in those two
2 separate phone calls he's on his way to Oxford. I believe he
3 says he's going to go see either the Scruggs Law Firm or
4 Mr. Scruggs or words to that effect.

5 One of the phone calls he tells, I believe Mr. Patterson,
6 he's on his way to go see Sid to pick up that thing. We know
7 from phone calls during that morning that he's on his way to
8 head south, which is Calhoun City, south of Oxford. So based
9 on those earlier phone calls, on the 27th, I gave much more
10 weight to the veracity of those phone calls than I did to that
11 conversation that Mr. Balducci had with the judge while
12 conducting elicitation --

13 Q. Okay. Was one of the conversations to which you just
14 referred with Steve Patterson when he's talking about this
15 order with Balducci? Did that conversation take place before
16 Balducci meets with Judge Lackey?

17 A. Yes, it does.

18 Q. Okay. So did you believe that Balducci wasn't telling the
19 truth here?

20 A. I had reason to doubt what he was saying.

21 Q. Okay. And then based on subsequent conversations, who
22 else did you think knew or at least you believed had probable
23 cause to know that there was a crime taking place?

24 A. Subsequent conversations we believe that Mr. Scruggs,
25 based on -- on Mr. Balducci saying he's going to the law firm

1 before that day, we had surveillance locate Mr. Balducci
2 returning to the Scruggs Law Firm after the first bribe payment
3 on September 27th. We had the four-minute phone call September
4 27th immediately after Mr. Balducci had agreed to the bribe
5 payment with the judge in Calhoun City.

6 We had, I believe, a surveillance later in October showing
7 Mr. Patterson and Mr. Balducci visiting the Scruggs Law Firm
8 while these payments were going on -- in the midst of these
9 bribe payments.

10 Q. Let me ask you this: You mentioned just a minute ago --
11 you said something about Sid. What did you say about Sid?

12 A. One of the intercepted phone calls on the morning of the
13 27th was, I believe, Mr. Balducci told Mr. Patterson that he
14 was going to see Sid to pick that thing up.

15 Q. Okay.

16 A. And, you know, later in the day after Mr. Balducci had
17 dropped off the money and an order -- we did in fact recover an
18 order from the judge's office.

19 Q. Okay. And then one final point they make about this.
20 They say that on October the 10th that Balducci called Judge
21 Lackey and asked when he could pick up the sweet potatoes.

22 A. Uh-huh (yes).

23 Q. Did you think Tim Balducci was going to pick up sweet
24 potatoes from Judge Lackey?

25 A. No, sir.

1 Q. What did you think that was?

2 A. Sweet potatoes was their code word for the order.

3 Q. Okay. At the end of that conversation, Balducci talks
4 about he was going to get back to Judge Lackey about, quote,
5 that other deal.

6 A. Yes, sir.

7 Q. The defendants say that this is strong evidence that
8 Balducci did not understand Lackey's request for the payment to
9 be connected with the order being entered in the Scruggs case.
10 Is that how you saw?

11 A. No. I think it's pretty clear what Mr. Balducci meant by
12 the other deal was the second half of the money on
13 September 27th even though he'd originally agreed on 40,000.
14 He delivered 20,000; and during that conversation, he said he
15 would get the rest of them later. And that's what I took that
16 October 10th conversation to mean was the other deal was the
17 remaining 20,000 of the 40,000.

18 MR. SANDERS: Tender the witness, Your Honor.

19 THE COURT: Very well.

20 CROSS-EXAMINATION

21 BY MR. KEKER:

22 Q. Agent Delaney, the October 16 affidavit in support of the
23 Patterson wiretap repeats, in essence, all the allegations with
24 all the omissions that were in the one we just talked about,
25 right?

1 A. Yes, sir.

2 Q. Okay. So we won't go over that again. But all of that
3 applies to this, too --

4 A. Yes, sir.

5 Q. -- what we talked about. And then what's new here --
6 let's start with the big one. You had a tape that you knew
7 amounted to Mr. Balducci telling Judge Lackey that Scruggs did
8 not know about the bribe that was being paid on September 27th;
9 is that a fair characterization?

10 A. That's what he told him, yes, sir.

11 Q. And you didn't think it was true?

12 A. I had reason to doubt it, yes, sir.

13 Q. Okay. Now, in your FBI training, do they tell you that
14 when you're preparing an affidavit for probable cause you are
15 to present a fair picture of all the evidence to the judge to
16 let him decide?

17 A. I believe we're suppose to present evidence that I think
18 gives probable cause that would lead to the approval of the
19 warrant.

20 Q. Okay. So your job -- the FBI training tells you your job
21 is to present the information to the judge that will allow you
22 to get a warrant whether or not it is a fair picture of what's
23 going on?

24 A. No, I don't think that's accurate.

25 Q. Does the FBI care about whether or not they present to a

1 judicial officer --

2 A. Yes, they do.

3 Q. -- a search warrant affidavit -- whether or not it's a
4 fair picture of what's going on?

5 A. Yes, they do.

6 Q. And how does the judge weigh whether or not it's a fair
7 picture if you leave out all the favorable information or all
8 the information that doesn't fit your view of the events?

9 A. I think the fact that you have those calls from
10 September 27th in the morning -- I think that's -- there's
11 enough weight given to know that -- that establishes the
12 probable cause that Mr. Patterson was involved in the
13 conspiracy and using his phone to do so.

14 Q. Okay. You think you had enough on Mr. Patterson. And the
15 allegation, though, was that the conspiracy included Dick
16 Scruggs.

17 A. Yes, sir.

18 Q. And you were making quite a point in this affidavit that
19 Dick Scruggs was an important member of this conspiracy.

20 A. I think there was enough probable cause to establish that,
21 yes.

22 Q. And did you leave out of your affidavit that Judge Lackey
23 made a real yeoman's effort, a tremendous effort, in
24 September 27th to get some evidence on Dick Scruggs; and he
25 failed?

1 A. That conversation was not in the affidavit, no.

2 Q. Okay. Balducci said to him, "This is just between you and
3 me." You didn't tell them that in the affidavit, did you?

4 A. No, sir.

5 Q. And he repeated it, "This is just between you and me."
6 And Lackey said, "All right." That's not in the affidavit,
7 right?

8 A. No, sir.

9 THE COURT: Counsel, just a moment. There's nobody
10 rising from the prosecutor's table; but in my interest of
11 judicial economy, this is an affidavit from a wiretap on
12 Patterson's phone, not Mr. Scruggs' phone. You're not trying
13 to introduce probable cause that Mr. Scruggs had committed a
14 crime by this affidavit. They're trying to introduce probable
15 cause to tap Mr. Patterson's phone.

16 MR. KEKER: I hear Your Honor, but that's -- the
17 affidavit that was presented is that there is probable cause to
18 believe that Tim Balducci, Dickie Scruggs, Steven Patterson,
19 and so on, P.L. Blake -- they are alleging -- this agent is
20 asserting here there's probable cause to believe there was a
21 conspiracy, and these people were members of it.

22 And in order to evaluate that affidavit, it's our position
23 that leaving out not just significant but totally exculpatory
24 information about Blake, who said he didn't know anything about
25 it, and leaving out totally exculpatory information about

1 Scruggs, who Balducci said didn't know anything about it, is
2 improper, unfair, and undercuts probable cause for the
3 conspiracy that they're alleging exists. If they'd just said,
4 Patterson and Balducci are doing something, I suppose --

5 THE COURT: Well, if he just said Patterson was doing
6 something, that's sufficient to tap his phone, which is who
7 they tapped. I'll reserve ruling on that. Go ahead.

8 MR. KEKER: And then I go back to the point this
9 Patterson tap picked up --

10 THE COURT: Picked them up later. But that's a
11 question of whether or not probable cause was presented to tap
12 the phone that was tapped, which is Patterson. But whether --
13 okay. But you may proceed. You know, I agree that by that
14 Patterson phone tap that information came in as a result that
15 pointed to any one of these three defendants. Then these three
16 defendants would have cause to complain of the probable cause
17 that was presented for that wiretap.

18 But still, the probable cause that the Court was dealing
19 with was really about Patterson, not about these three
20 defendants. But I'll -- you go ahead. I'll reserve ruling on
21 that and certainly going to have to hear more information.

22 MR. KEKER: I think though since -- we are stuck
23 with -- I know one of my colleagues has made a James motion,
24 that the Government is going to take advantage of the fact that
25 they've charged a conspiracy to say that everybody is liable

1 for everything; and that's what they're alleging here. And if
2 they'd just thought they were investigating Steve Patterson, I
3 agree we'd have a different situation. But that's not what --
4 that's not what the special agent --

5 THE COURT: Suppose they had only put in Patterson in
6 the affidavit; we want to tap Patterson's phone.

7 MR. KEKER: Then they'd have to show that he was
8 committing -- there's probable cause to believe that Patterson
9 was committing a crime, and they'd have to say what that was.

10 THE COURT: Right. And they could have said, We
11 believe he's involved in a conspiracy with Balducci to bribe
12 Judge Lackey. And they would have had that, assumed they could
13 have had that probable cause.

14 MR. KEKER: I think that's true. And if they'd said
15 that, the magistrate might have looked at it and said, Well,
16 what in the world -- I mean, this doesn't make any sense. This
17 whole -- the whole thrust of why they're trying to get a
18 probable cause determination is the Scruggs firm was involved
19 in it.

20 That's what they're -- that's what they say the case is
21 about, and that's what we say -- I mean, if Balducci and
22 Patterson -- we say that Balducci and Patterson were doing
23 whatever they were doing all by themselves without the
24 knowledge of these folks, at least through this period that
25 we're talking about --

1 THE COURT: Well, all right. But -- we'll go
2 forward.

3 MR. KEKER: And I think, Your Honor, we've briefed
4 this. We can go on to the next one. The big headline here is
5 there's exculpatory information about P.L. Blake that -- I
6 mean, let me ask a couple of questions about that because I
7 didn't get that.

8 BY MR. KEKER:

9 Q. On September 27, you have a phone call that says P.L.
10 Blake doesn't know what this money is for, doesn't know
11 anything about it, right?

12 A. That's what Patterson tells Balducci, yes.

13 Q. Okay. And you decide to leave that out of an affidavit
14 that says there's a conspiracy involving Blake?

15 A. Uh-huh (yes).

16 Q. And the reason you do that is you found out by October 10
17 P.L. Blake knows something about an order?

18 A. Yes.

19 Q. And so, therefore, you connected in your mind the order
20 with the money; and you concluded that P.L. Blake knew about
21 the -- some connection between the two?

22 A. I didn't know definitely; I thought there's probable cause
23 to believe that.

24 Q. And based on that belief, you chose to leave out a full
25 and complete statement from -- in a conversation between

1 Patterson & Balducci that P.L. Blake didn't know anything about
2 this?

3 A. Yes.

4 Q. And you chose to not -- I'm not going to let the judge
5 know about that?

6 A. Yes.

7 MR. KEKER: That's enough for this one, Your Honor.
8 We will rely on our briefing. We've got other points.

9 THE COURT: Very well. Do you have any redirect?

10 MR. SANDERS: No, Your Honor, no redirect on that.

11 THE COURT: All right. All right. The Balducci cell
12 phone extension, that was the 30-day extension that came up
13 earlier in our discussion, was signed on October 29th. Are you
14 ready to proceed on that, Mr. Keker?

15 MR. KEKER: Yes, sir.

16 THE COURT: Or you, Mr. Sanders?

17 MR. SANDERS: Yes, sir, Your Honor. And as I noted
18 in our response to their motion, I think in their motion they
19 just -- they don't point to any specific omissions or what they
20 call misleading statements with respect to the extension
21 affidavit. They just rely on what they've argued beforehand,
22 so we would stand on what we've done thus far in here.

23 THE COURT: All right. In other words, there are no
24 new omissions or misleading statements listed in the motion
25 concerning the cell phone extension.

1 MR. SANDERS: That's right.

2 THE COURT: Is that right, Mr. Keker?

3 MR. KEKER: If I could just have a moment, Your
4 Honor.

5 THE COURT: Okay.

6 MR. KEKER: Well, actually, could I ask a couple of
7 questions to show that there's a --

8 THE COURT: Ask him a couple?

9 MR. KEKER: Yes, sir.

10 THE COURT: All right. You may.

11 CROSS-EXAMINATION

12 BY MR. KEKER:

13 Q. Now, by the October 24 affidavit, which is Exhibit 31 to
14 Mr. Dooley's declaration, you just dropped P.L. Blake out of
15 this conspiracy, didn't you?

16 A. Yes, I did.

17 Q. And that's because you determined that you were wrong in
18 what you'd said on October 16 about P.L. Blake?

19 A. I don't believe we came up with any further evidence to
20 show that he was involved, no.

21 Q. And did you tell the judge, when you came for the
22 October 24 extension, that what you'd told them before about
23 P.L. Blake hadn't panned out; and you just were dropping P.L.
24 Blake, including exculpatory information, everything about P.L.
25 Blake, out of this affidavit? You want me to show you the

1 affidavit?

2 A. If you'd like.

3 Q. Show you Exhibit 31. The question is, P.L. Blake is gone.
4 He's not a member of the conspiracy. There's no information
5 about him. There's nothing about calls to him. And you didn't
6 tell the judge that what you'd said before turned out not to be
7 true.

8 A. He's not listed on the affidavit, on the extension, no.

9 Q. Okay. And you didn't tell the judge --

10 A. Well, I mean, the fact that he's omitted from the
11 affidavit, I think, is pretty clear that we no longer consider
12 him or, at that time, didn't consider him a subject.

13 Q. That's all I have. And the rest that's in here is an
14 accumulation of what we've talked about so far?

15 A. Yes, sir.

16 Q. Okay. With the same omissions and the same issues that
17 we've talked about?

18 A. Yes, sir.

19 MR. KEKER: That's all I have on that one, Your
20 Honor.

21 THE COURT: Very well. Anything else?

22 MR. SANDERS: No, Your Honor.

23 THE COURT: Very well.

24 MR. KEKER: We've got the search warrant affidavit,
25 Your Honor. Should we go with that one?

1 THE COURT: Yes, we can go forward.

2 MR. SANDERS: Your Honor, I believe with the search
3 warrant, as with the extension on the wiretap -- I don't think
4 they refer to any more specific omissions or misleading
5 statements; and I think we simply refer back to what we've done
6 so far.

7 THE COURT: Very well. Do you agree with that,
8 Mr. Keker?

9 MR. KEKER: No, I don't, Your Honor.

10 THE COURT: With what do you disagree?

11 MR. KEKER: Well, there's a lot in the search warrant
12 affidavit that has even more omissions. I mean, for example,
13 by now the March 2007 meeting is reduced to this, that
14 Balducci, Patterson, Scruggs, Backstrom, and Zach Scruggs met
15 in the offices of Scruggs Law Firm in Oxford for purposes of
16 discussing ways and means of corruptly influencing the outcome
17 of *Jones, et al v. Scruggs, et al*. Now we've heard a lot more
18 about that. There's a lot more about that meeting than that.

19 But in addition, by this time, they have Mr. Balducci; and
20 Mr. Balducci sat down and talked to them. And Mr. Balducci has
21 said things I'd like to ask Agent Delaney about that are left
22 out of this affidavit and so on. I mean, there's a number of
23 things in this affidavit.

24 THE COURT: All right. Since there is an
25 affidavit -- since there is a search warrant, there was an

1 affidavit, then the Court has determined there was probable
2 cause to look on the face of the affidavit. So, therefore, the
3 burden comes to the defendant to attack the affidavit.

4 MR. KEKER: Okay. Let me get my --

5 MR. SANDERS: Your Honor, under *Franks*, even to have
6 a hearing, they've got to make a substantial preliminary
7 showing. And in their motion, they didn't mention any of this
8 that Mr. Keker is talking about; so I don't think they've made
9 the showing that would entitle them to the hearing at this
10 stage.

11 MR. KEKER: I don't think that's true.

12 THE COURT: The question is the suppression of a
13 search warrant affidavit, they can -- the Court will allow them
14 to attack the affidavit, but the burden switches from the
15 Government to justify the search to the defendant to show why
16 there was no probable cause in the affidavit.

17 MR. KEKER: Then, beginning with --

18 THE COURT: It may not be in the motion, but I'm
19 going to let the -- try to establish something anyway.

20 CROSS-EXAMINATION

21 BY MR. KEKER:

22 Q. Agent Delaney, do you have your 302?

23 A. (Shaking head negatively.)

24 Q. The 302 of your interview with Mr. Balducci on November 2,
25 2007?

1 A. I don't have it with me.

2 Q. Could we get a copy to put up in front of him in case he
3 needs to refer to it?

4 MR. SANDERS: And I've got a copy for him, Your
5 Honor, if I can --

6 THE COURT: All right.

7 BY MR. KEKER:

8 Q. I'm going to give you two, one is dated -- well, you tell
9 me what they are dated. I think they are --

10 A. 11/2 and 11/7, sir.

11 Q. And those are the dates of the interviews?

12 A. Yes, sir.

13 Q. And these are interviews with Mr. Balducci?

14 A. Yes, sir.

15 Q. And you and another agent conducted them?

16 A. Yes, sir.

17 THE COURT: Are you claiming in this, even though you
18 didn't put anything in your motion about omissions or
19 misleading statements -- is that what you're claiming about the
20 defects in this affidavit?

21 MR. KEKER: Yes, sir.

22 THE COURT: All right.

23 BY MR. KEKER:

24 Q. In the search warrant affidavit, which is dated
25 November 26 and which was written after you interviewed

1 Mr. Balducci on 11 -- on November 2 and November 7, correct?

2 A. Yes.

3 Q. You stated -- and all you stated about March 2007 in the
4 Scruggs office is what I just read, that five people met in the
5 offices of the Scruggs Law Firm in Oxford for the purposes of
6 discussing ways and means for the purpose of corruptly
7 influencing the outcome of *Jones et al. V. Scruggs*, right?

8 A. Yes.

9 Q. And at that point, you knew Mr. Balducci, who you arrested
10 and was cooperating, had said that at that meeting Dick Scruggs
11 said he was not asking Balducci for anything illegal but would
12 Balducci see if the judge would move the matter to arbitration.
13 You knew that you were -- that he'd said that to you, and you
14 omitted it from the search warrant affidavit.

15 A. There was some disagreement -- I'm not going to say
16 disagreement -- misunderstanding about that statement. That
17 was my understanding the way he said it at the time. We later
18 talked to him about it. He said that was not his recollection
19 of that meeting.

20 That information went in the affidavit subsequently after
21 that where we discussed it again. And we talked about it; and
22 we determined that it, you know -- that it is what myself and
23 the other agent heard. And at that time, Mr. Balducci was not
24 going to dispute it. He said, "If that's what you heard,
25 that's what I said."

1 Q. You had notes of your interviews on the 2nd and 7th of
2 November with Mr. Balducci, didn't you?

3 A. Yes.

4 Q. And when you checked your notes and what your notes told
5 you, you were right in what you put in the report?

6 A. Yes, sir.

7 Q. Dick Scruggs said he was not asking Balducci for anything
8 illegal?

9 A. Yes.

10 Q. And you didn't -- just tell us why you didn't put that
11 into the search warrant affidavit. Why didn't you say --
12 instead of saying they met for purposes to figure out
13 corrupt -- how to corruptly influence the outcome of the case,
14 why didn't you say, two weeks ago the persons there -- I wasn't
15 there, the person that was there told me that Dick Scruggs said
16 he didn't want to do anything illegal; but will you please talk
17 to your friend, the judge, about getting this case to
18 arbitration? Why didn't you put that in the affidavit?

19 A. Again, that issue -- when the affidavit was written, I was
20 under the -- I was under the belief, based on the subsequent
21 interview with Mr. Balducci, that there was elicited conversation
22 in that March 20th interview. I did not check my notes when I
23 talked to Mr. Balducci the second time. I was going off my
24 memory. He assured me that there was.

25 When I subsequently later went back -- and this was after

1 the affidavit was signed -- I checked my notes and saw that in
2 fact that's what my notes reflected, that he said there was
3 nothing illegal -- Mr. Scruggs was not asking him to do
4 anything illegal.

5 Q. You also said that Dick Scruggs stated that Judge Lackey
6 ought to move the case to arbitration since it was the correct
7 thing to do. Why didn't you put that in the affidavit?

8 A. Because, again, that was back in March. Subsequently, as
9 the investigation rolled on, it showed that that was not the
10 case. That may have been at that time; but subsequently, it
11 was -- it appeared that there was more to it than that, just
12 asking the judge to do -- to move the case to arbitration, but
13 to actually, you know, bribe the judge to have it done.

14 Q. But -- okay. You're telling the judge who you're
15 submitting the search warrant affidavit to that the meeting in
16 March was for the purpose of discussing ways and means of
17 corruptly influencing the outcome of the case; and you don't
18 put in that Scruggs said he didn't want to do anything illegal,
19 the right thing to do was to move it to arbitration?

20 A. Again, the first interview, that's what I had in my notes.
21 The subsequent interview with Mr. Balducci, I did not have my
22 notes in front of me when I spoke to him. He assured me that's
23 not what happened; I misunderstood him. When I later -- after
24 the affidavit was signed -- checked my notes, confirmed with my
25 partner, I felt that I was correct in the first instance; and

1 Mr. Balducci was not.

2 Q. Did you come back to the judge --

3 A. No, I did not. No, I did not.

4 Q. Let me finish the question. Did you come back to the
5 judge who signed the search warrant affidavit and say, Judge, I
6 had mistaken memory; and I said some things in my affidavit
7 that I now know are wrong. I'm sorry. I just wanted you to
8 know that?

9 A. No, I did not.

10 Q. Did you put in the search warrant affidavit that Balducci
11 told Dick Scruggs that Balducci would see Judge Lackey and ask
12 him as a favor to rule for arbitration in the case, as a favor?

13 A. No.

14 Q. Did you tell -- in the affidavit, you talk about, very
15 briefly, the March 28 meeting where Balducci went down to see
16 Judge Lackey, right?

17 A. Yes, sir.

18 Q. And you said about it -- well, the judge can read it. He
19 requested a private meeting; he was not a party. During the
20 course of the conversation, Mr. Balducci made corrupt overtures
21 to Judge Lackey who reported the same to federal officials.

22 A. Uh-huh (yes).

23 Q. At that time, did you know it took him two weeks?

24 A. No.

25 Q. Did you tell him that Mr. Balducci had told you that he'd

1 told Judge Lackey that this was for his personal benefit? He
2 asked him for a favor and said it was for his personal benefit?

3 A. No, I didn't put that in there.

4 Q. Okay. Why didn't you put that in?

5 A. Because, again, I think -- as the investigation moved
6 along, I think it showed that it wasn't just for a personal
7 favor; it was more than that.

8 Q. But you're telling the judge about these meetings. You're
9 taking the trouble to tell him about the meetings, but you're
10 not telling him what actually happened at the meetings. That's
11 okay?

12 A. I didn't put it in.

13 Q. You said that -- we just read it -- that at the meeting,
14 you said to the judge, who decided the search warrant issue,
15 that at the meeting he made corrupt overtures; but you didn't
16 put in the affidavit that Balducci said he would benefit if
17 Judge Lackey ruled in favor of the Scruggs Law Firm, ruled for
18 arbitration.

19 And that he further stated it would be considered a
20 personal favor if Judge Lackey ruled for arbitration, and
21 arbitration was the correct legal way to settle the matter.
22 And that Balducci also mentioned that he had mentioned the
23 position of, of counsel when the judge was ready to retire; but
24 that the offer of, of counsel was not related to or offered as
25 an incentive to rule as the -- as Balducci asked. That's what

1 he told you, right?

2 A. That's what he told me.

3 Q. So did you tell the judge in the November 26th search
4 warrant affidavit when you said corrupt overtures had been made
5 that Balducci told you the two things were not tied together
6 and no corrupt overtures had been made?

7 A. That's correct.

8 Q. Did you tell him that?

9 A. No. We relied on, basically, that information came from
10 what the judge -- the judge was still under the impression that
11 the two were tied. Mr. Balducci's version was they were not
12 tied.

13 Q. Did you tell him it took the judge two weeks to figure out
14 that maybe there was a problem?

15 A. Again, at the time -- I did not know at the time it took
16 the judge two weeks.

17 Q. I'm sorry?

18 A. I did not know at the time there was a two-week lag time
19 between Mr. Balducci's visit and the judge reporting it to the
20 United States Attorney's Office.

21 Q. Why didn't you tell him at least that one side, Balducci
22 said there wasn't any corrupt overture; it wasn't meant that
23 way?

24 A. I don't know. I just left it out.

25 Q. You did it on purpose?

1 A. No, I did not do it on purpose.

2 THE COURT: Excuse me, gentlemen. May I have a copy
3 of this affidavit for the search warrant?

4 MR. KEKER: Yes, sir. Here's the affidavit. You
5 want a copy of the 302, Your Honor?

6 THE COURT: No, just the affidavit. Thank you.

7 BY MR. KEKER:

8 Q. Did -- were you aware of Balducci having contacts with
9 people at the Scruggs firm after he was arrested that were not
10 recorded?

11 A. I'm sorry. Say that again, sir.

12 Q. Did you send Balducci to the Scruggs Law Firm to try to
13 gather evidence without wiring him up?

14 A. No, not to gather evidence. It was simply to try and see
15 if he could get Mr. Backstrom to come to his office so he could
16 talk to him in private.

17 Q. Did you send him to the Scruggs office on November 19?

18 A. I asked him to go over there and see if Mr. Backstrom
19 would come back to his office with him.

20 Q. And he was not wired?

21 A. No, sir, he was not.

22 Q. Did he tell you about the conversation he had with people
23 at the Scruggs firm while he was there?

24 A. He told me he went in, spoke with one of the secretaries;
25 I think he didn't know who it was. They told him that

1 Mr. Backstrom was not in the office and would not be there, and
2 he came back.

3 Q. Did he tell you any conversations he had with anybody at
4 the Scruggs firm about the work that he was doing on the voir
5 dire or the jury instructions?

6 A. No, I don't recall him telling me that.

7 MR. KEKER: Your Honor, I believe the rest --

8 THE WITNESS: You talking about on that particular
9 day, sir, on November --

10 BY MR. KEKER:

11 Q. Well, I mean, did he ever go back and have a conversation
12 that wasn't recorded where he talked about work on the jury
13 instructions and voir dire?

14 THE COURT: Are you saying that relates to --

15 MR. KEKER: No, it's omitted. I'm trying to
16 establish it, and I want to point out that it's not in the
17 affidavit.

18 THE WITNESS: I'm not sure. The only two occasions I
19 recall him going over to the Scruggs Law Firm was on the
20 November 19th incident we just discussed and then on
21 November 5th when he picked up a package at the financial
22 office, not the main office.

23 MR. KEKER: Your Honor, I think the rest of the
24 omissions and misstatements are -- in this affidavit are things
25 that we have talked about that have accumulated from the other

1 ones; so I think that's the only thing I have. May I check
2 with my colleagues?

3 THE COURT: Check and see. While you're doing that,
4 is there anything in this affidavit, anything else, that you
5 want to call attention to that you haven't -- I don't recall
6 you've said anything about this affidavit about false
7 statements or mis --

8 MR. KEKER: Well, I can go back over them. We
9 believe that the -- almost all of this is false. The
10 description of the March meeting at the Scruggs Law Firm, we've
11 talked about. The meeting with Judge Lackey, which is referred
12 to in here, we've talked about. We think those are false.

13 THE COURT: Wait just a minute. What meeting with
14 Judge Lackey that was false?

15 MR. KEKER: The description of the meeting with Judge
16 Lackey on May 28th -- excuse me -- March 28th, the initial
17 meeting where he went down there. And that's on page 1 of the
18 affidavit. And he said he requested a private meeting. At the
19 bottom of the page, it says, "Balducci, during the course of
20 the conversation -- next to the last line. "Balducci made
21 corrupt overtures to Judge Lackey, who reported the same to
22 federal officials."

23 And we believe that that, given context, is false. It's
24 false in various ways. First of all, he knew and omitted the
25 very important fact that Judge Lackey didn't know whether or

1 not corrupt -- that's what he's been saying here, took him six
2 months to figure out if anything was corrupt; and that's only
3 because he raised \$40,000.

4 The second thing is that -- what Balducci had told him by
5 this point is that at that meeting Balducci said he would
6 benefit if Judge Lackey ruled in favor; I'm here for a personal
7 favor. I would benefit if you ruled for arbitration. And he
8 also said arbitration was the correct legal way to settle the
9 matter. Balducci also offered Lackey a position of counsel
10 when the judge was ready to retire; but he said, the offer of,
11 of counsel was not related to or offered as an incentive to
12 rule as the -- as Balducci had asked.

13 And so, the person doing it has said, I was not making
14 your quid pro quo corrupt overture. The person receiving it
15 took two-weeks to report it to the federal government and
16 apparently a lot of phone calls and --

17 THE COURT: Well, is that false? What's in here
18 that's false?

19 MR. KEKER: Well, during the course of the
20 conversation, Mr. Balducci made corrupt overtures to Judge
21 Lackey who reported the same to federal officials.

22 THE COURT: Well, would that not be subject to
23 interpretation what you meant by --

24 MR. KEKER: I think that's fair; but if I were a --

25 THE COURT: You're arguing that corrupt is equal to

1 illegal here, criminal.

2 MR. KEKER: Yes, sir.

3 THE COURT: Okay. I get your point now.

4 MR. KEKER: The affidavit is submitted for a search
5 warrant they say that they're investigating bribery, public
6 corruption. The whole emphasis is on a criminal act. Probable
7 cause to show that a violation of 666 is happening.

8 THE COURT: All right. What else? The other
9 statement that you say is false?

10 MR. KEKER: The May 3rd meeting, first of all,
11 implied -- which is on page 2 -- implies that it was recorded
12 because there -- it's being quoted. We now know that it wasn't
13 recorded. And there's this statement about Judge Lackey that
14 they had changed their strategy. I don't think there's any
15 evidence of that. The May 4 call is omitted completely.

16 THE COURT: Wait a minute. Wait a minute. There's
17 no evidence of that perhaps, but you're saying it's false. Do
18 you have evidence that it's false?

19 MR. KEKER: I think I do. I mean, what Balducci had
20 told him by the time of this affidavit was that in March they
21 were talking about, Would you go see your friend, Judge Lackey,
22 and explain to him that we'd like this case to go -- don't want
23 anything illegal but love to have it go to arbitration, the
24 legally correct thing.

25 Now he's saying they've changed their strategy and would

1 like to rely on an order to compel binding arbitration. That's
2 nonsense. On March 19th, they filed a motion to compel
3 arbitration. According to Balducci, they said in March that
4 that's what they wanted; and now somebody is saying in this
5 unrecorded call they've changed their strategy and want --

6 THE COURT: I know. But what we're dealing with here
7 is not ultimately whether it was true or false but whether this
8 agent knew it was true or false. And do you have any evidence
9 of that?

10 MR. KEKER: I do, Your Honor. The agent, the one who
11 sat with Mr. Balducci a month before he signed this, less than
12 a month before he signed this, and took down and wrote this
13 302, took his notes, wrote it.

14 THE COURT: Well, this agent says that Balducci told
15 him that. Now, what evidence do you have that that's not true?

16 MR. KEKER: That's not what he said -- I mean, they
17 couldn't have changed their strategy -- it doesn't make any
18 sense that they changed their strategy, if their strategy in
19 March was to go to arbitration.

20 THE COURT: Well, whether or not they used good sense
21 in changing their strategy is not in issue. The issue is did
22 this agent have a knowledge that your interpretation -- that
23 this statement is false. That's what I'm interested in.

24 MR. KEKER: Then the May 4 call we've talked about
25 before. There's exculpatory information that was omitted from

1 the May 4 call, one sentence. May 9, tremendous amount of
2 exculpatory information we've gone over. I can go over it
3 again if you'd like.

4 But they completely left out that there was no discussion
5 of money, no discussion of, of counsel position. He omitted
6 that Lackey viewed an arbitration request as a favor on which
7 to get credit. He omitted that Balducci said that this fax
8 order that he sent over was just something to look at.

9 And most importantly, he omitted that by May 9th, Lackey
10 had indicated that Balducci had agreed with him, the case
11 should go to arbitration. And they didn't make any plans to
12 meet again. And then the next thing -- so he leaves all that
13 out.

14 The next thing he puts in is May 21. And out of May 21,
15 he says, Mr. Balducci assured Judge Lackey that nobody other
16 than Balducci and Scruggs knew of the arrangement suggestion by
17 Balducci to Judge Lackey. That's not what he said. He said
18 nobody knows about this but you and me.

19 There wasn't any arrangement. And indeed, in the May 21
20 discussion -- we've been over this, but I'll just mention it
21 again -- he omitted that Lackey had been pursuing Balducci
22 during the day, two earlier calls. He omitted that he assured
23 Judge Lackey --

24 THE COURT: I know. We've gotten over that omission
25 stuff. Let's just talk about what you claim is false. That's

1 what my question was.

2 MR. KEKER: Okay. Well, I believe those things
3 render the statements that's in here false, things I've said
4 already. And especially Mr. Balducci assured Judge Lackey that
5 nobody other than Balducci and Scruggs knew of the arrangements
6 suggested by Balducci to Judge Lackey. That suggests there was
7 an arrangement, suggested by Balducci to Judge Lackey.

8 And what actually -- what Balducci said is, "Frankly, I
9 think we're right; and I think the law's on our side. And I
10 think probably had I never even approached you, you'd probably
11 had the right result for us in this thing. My goal is simply
12 to tell you where I am interested in this thing and help guide
13 you to where I thought this thing legally could come."

14 What arrangement? That's not an arrangement. And yet he
15 says there is an arrangement. And then it jumps. And we
16 believe this is a significant omission. And I am not going to
17 go over it again. It jumps to September 18. It goes from
18 nothing to September 18. And then in September 18, we talk
19 about what's wrong with it from then on.

20 THE COURT: Okay. Thank you.

21 MR. KEKER: Your Honor, before I sit down, we're
22 working out this Jencks Act material with the Government, but I
23 just wanted to put on the record that the Government has agreed
24 to give us the 302s of Agent Delaney's interviews that he had
25 referred to during his testimony and the interviews with Lackey

1 on April 24, May 3rd, and September 18. And we'd like to get
2 it before he's excused while this motion hearing is still going
3 on in case there's something in there that we need to ask him
4 if we can reopen based on what we have. And I think we're
5 getting it as soon as possible.

6 THE COURT: They've agreed to give it to you now?

7 MR. KEKER: Yes, sir.

8 THE COURT: Well, that's very generous of them.

9 MR. KEKER: Following the law is never generous, Your
10 Honor. It's just the law.

11 THE COURT: Well, it says after direct examination,
12 before cross-examination, they're required to give it to you.
13 Now they're giving it to you about a month before the trial
14 date. So I think that is generous. Do you have anything else
15 you want to add to this search warrant --

16 MR. KEKER: Your Honor, if I can just get this
17 straight. It was May 3rd, April 24, and May 22.

18 THE COURT: Very well.

19 MR. SANDERS: Your Honor, I can. I can clear up a
20 couple of things that Agent Delaney talked about. But frankly,
21 Your Honor, I think everything the Court needs to find probable
22 cause is in the search warrant itself.

23 THE COURT: Well, I'm sure you feel that way.

24 MR. SANDERS: I can clear up those points, Your
25 Honor.

1 THE COURT: If you want to, for the record, you may.

2 MR. SANDERS: Yes, sir.

3 THE COURT: The affidavit, however, speaks for itself
4 based on the record so far. But you may proceed.

5 MR. SANDERS: Okay.

6 REDIRECT EXAMINATION

7 BY MR. SANDERS:

8 Q. Agent Delaney, you talked about -- and I want to clarify
9 this language in your 302 with respect to what you believe
10 Balducci told you in the first meeting and what Balducci told
11 you about in the second meeting. All right? You know what I'm
12 talking about?

13 A. Yes, sir.

14 Q. All right. Explain what you thought Balducci said the
15 first time you met with Balducci with respect to what
16 Mr. Scruggs said to him at that first meeting.

17 A. In the first meeting, I -- he told me -- or what I
18 believed he told me was, in that meeting on March 28 when it
19 was him and Mr. Patterson and Mr. Scruggs and I believe
20 Mr. Backstrom and the other Mr. Scruggs, Mr. Scruggs said he
21 wanted him to go see Judge Lackey but would not ask him to do
22 anything illegal.

23 I wrote a draft of that report. I subsequently showed
24 that to Mr. Balducci to have him read it. And he advised me
25 and said, I don't -- that was not the content of that meeting

1 in March, that he was asking me to do something illegal.

2 Q. Okay. So what -- let me -- I'm trying to clarify this.

3 Let me see if I'm correct. Is Tim saying that Mr. Scruggs told
4 him, don't do anything illegal?

5 A. That was my interpretation of what he said on the first
6 meeting on November 2nd. When he looked at the draft of my
7 report, he saw that and said, "No, that's not accurate. That's
8 not what happened at that March meeting. He didn't tell me not
9 to do anything illegal."

10 Q. And that's what you came to believe when you signed the
11 affidavit?

12 A. Yes.

13 Q. All right. Now, a couple of things that he mentioned in
14 passing. He said that it took Judge Lackey six months to
15 figure out if anything corrupt was taking place. Did it take
16 Judge Lackey six months to determine whether anything corrupt
17 was taking place?

18 A. No. By corrupt, I mean, are we talking about illicit or
19 are we talking about criminal?

20 Q. He said corrupt. I don't know what he meant.

21 A. I mean, corrupt -- certainly illicit in those first
22 meetings from Judge Lackey's perspective.

23 Q. And also, they've referred to a couple of different times
24 on the May 3rd statements made that you put it in quotes in the
25 affidavit, statements made by, I believe, Balducci on May 3rd.

1 Did you put them in quotes to mislead the Court as if it were a
2 recording?

3 A. No.

4 Q. Why did you put it in quotes?

5 A. That was taken from a statement from Judge Lackey.

6 Q. And finally, what date did you sign this search warrant
7 affidavit?

8 A. I believe it was November 26th.

9 Q. All right. It was after November 1st?

10 A. Yes.

11 Q. And did Balducci wear a wire into the Scruggs Law Firm on
12 November 1st?

13 A. Yes, he did.

14 Q. And did he talk to each of the defendants?

15 A. Yes, he did.

16 Q. Did he talk to each of the defendants about the bribe he
17 was paying to Judge Lackey?

18 A. He discussed the order that he'd picked up from Judge
19 Lackey earlier the morning of November 1st after he delivered
20 \$10,000.

21 Q. Did he discuss the bribe they were paying to Judge Lackey
22 to Zach Scruggs?

23 A. Yes.

24 Q. What did he say exactly?

25 A. He showed him the order; and sounds like from the

1 recording of the conversation, that they read the new paragraph
2 that Judge Lackey had inserted into that order that he picked
3 up November 1st and discussed the language in that order.

4 Q. Did he talk about paying for it?

5 A. Well, Mr. Balducci made the comment that -- saying, you
6 know, let's get this right; you're paying for it; let's get it
7 the way you want it.

8 Q. Who was standing with him when he said that?

9 A. I believe it was Mr. Backstrom and Mr. Zach Scruggs.

10 Q. All right. And then did he talk to Mr. Dick Scruggs?

11 A. Afterwards, yes, in private.

12 Q. And did he talk about a bribe they were paying to Judge
13 Lackey with Mr. Scruggs?

14 A. Yes.

15 Q. What did he say about the bribe in that instance?

16 A. Basically, to paraphrase the conversation --

17 THE COURT: Counsel, the affidavit speaks for itself.

18 MR. SANDERS: Yes, sir, Your Honor. No further
19 questions.

20 THE COURT: We've already gone over that. You may
21 step down.

22 MR. KEKER: May I question, Your Honor, just about
23 that redirect?

24 THE COURT: What part of the redirect?

25 MR. KEKER: Just looking at the draft report.

1 THE COURT: Okay.

2 MR. KEKER: That he just talked about.

3 RECROSS-EXAMINATION

4 BY MR. KEKER:

5 Q. Agent Delaney, when did you write the draft report that
6 later Mr. Balducci had trouble with? I don't think we have
7 that one for you.

8 A. I've got it. It's dated November 12th.

9 Q. So on November 12, you wrote your -- what became your 302;
10 and then you say you had Balducci read it?

11 A. Yes.

12 Q. He said this morning that he never saw it. He said that
13 you read it to him. Do you remember which is the truth?

14 A. No. I specifically -- I gave those reports to him and had
15 him read it.

16 Q. And there was some disagreement on his part about this
17 part of the report where Dick Scruggs said he didn't want him
18 to do anything illegal?

19 A. Yes.

20 Q. And you then went back to your original notes from the
21 interview, as well as consulted the other FBI person there,
22 Agent Surles?

23 A. Yes.

24 Q. And you decided you were right and Balducci was wrong?

25 A. I felt more comfortable that that was the accurate

1 reflection of what he said that evening, yes.

2 Q. Do you still have those notes?

3 A. Yes.

4 Q. Do you have the draft 302 that you showed to Mr. Balducci
5 and had him read?

6 A. No, I don't have the draft.

7 Q. But you have the notes?

8 A. Yes.

9 MR. KEKER: Your Honor, we'd ask for an order
10 reserving all notes in the case, specifically those.

11 THE COURT: I'll take that under advisement.

12 MR. KEKER: Nothing further. Thank you.

13 THE COURT: All right. You may step down. Give that
14 to Mr. Keker. That's your affidavit, Mr. Keker.

15 MR. KEKER: Yes, sir.

16 THE COURT: As to these motions concerning the
17 adequacy of the probable cause in the affidavits for these
18 wiretaps and for the search warrant, the defendants attacked
19 the adequacy of the probable cause by bringing out alleged
20 omissions and alleged false statements.

21 The law, of course, is to the effect that, when deciding,
22 that the Court should look at whether the affidavits establish
23 probable cause with those statements included, if they had been
24 included. And, so, what I would like to see -- have from
25 counsel on both sides is -- I've taken notes, and I know

1 basically from those notes basically what the defendants claim
2 were the omitted statements that should have been put in and
3 what the statements are that the defendants claim were false.
4 But I would like -- I'd like a memorandum from the defendants
5 listing those alleged false and omitted statements that you
6 claim make the probable cause defective.

7 MR. KEKER: Would it be helpful if we -- rather than
8 just argue about this, if we just wrote the affidavit with
9 highlighting this was -- this part is omitted, should have been
10 there. And then this part is false. I mean, just sort of
11 rewrote the affidavit? Or do you want just a legal memorandum?

12 THE COURT: Well, I just want a listing of what you
13 claim. And the Government, also, if you want to do that also.
14 You seem to have already listed them from your argument here.

15 Also, there's still this question in the Court's mind
16 about what established probable cause, for example, the
17 Patterson wiretap and the Balducci wiretap. It's not contested
18 by either party that if someone is aggrieved over a wiretap
19 they have a standing to complain about it.

20 But the question in the Court's mind at this time is, What
21 do they complain about? Do they complain about the probable
22 cause to establish the wiretap of the person who owned the
23 phone or against whom the wiretap was sought, or can they
24 complain about whether any probable cause existed against the
25 person who was complaining about it, the aggrieved party whose

1 phone was not tapped?

2 In other words, there's no question that the three
3 defendants in this case have standing to complain about the
4 legality of the Patterson wiretap. Now, what can they complain
5 about? Can they complain about whether probable cause existed
6 against these three defendants when that wiretap was sought?
7 Or can they only complain about whether probable cause existed
8 to tap Patterson's phone?

9 Now, that's a question I'd like to hear some law about.
10 As I mentioned earlier, the three defendants in this case never
11 had any of their phones tapped. And if the Patterson wiretap,
12 for example, were illegal, then they have the right to attack
13 it. But to prove it was -- but was it illegal if it did not
14 have probable cause against these three defendants in the
15 affidavit, since it was only the Patterson phone that was
16 wiretapped?

17 I think there's an arguable basis to conclude that -- to
18 justify that wiretap, the Government has to show there was
19 probable cause to tap Patterson's phone and did not have to
20 show probable cause that there was a crime being committed by
21 these three defendants. So I'd like to hear your memorandum on
22 that. All right. And I'd like to get that -- I'd like to get
23 that by Monday.

24 MR. KEKER: End of the day Monday or --

25 THE COURT: End of the day. All right. Let's see.

1 It's four o'clock. I think we've gotten through the longest
2 motions that will be involved. We have left the motion to
3 dismiss Counts 2, 3, and 4 because of alleged lack of
4 jurisdiction. And the motion to exclude the 404(b) evidence,
5 that is, the prior bad acts evidence, prior similar bad acts.

6 And then we also have the motion of Zachary Scruggs and
7 Sid Backstrom to sever their trial from that of Richard Scruggs
8 and the motion for change of venue. I think we'll recess
9 today. We've been in Court a pretty good while today. And
10 take those up at nine-thirty tomorrow morning. We'll start
11 with the motion to dismiss Counts 2, 3, and 4 for lack of
12 jurisdiction and then go from that to the 404(b) motion.

13 All right, gentlemen, thank you very much. We'll be in
14 recess until nine-thirty.

15 (THE HEARING RECESSED AT 3:54 p.m.)
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C E R T I F I C A T E

I, Rita Davis Sisk, RPR, BCR, CSR #1626, Official Court Reporter for the United States District Court, Northern District of Mississippi, was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I, Rita Davis Sisk, RPR, BCR, CSR #1626, have caused said stenographic notes to be transcribed via computer, and that the foregoing pages are a true and accurate transcription to the best of my ability.

Witness my hand, this 20th day of February, 2008.



RITA DAVIS SISK, RPR, BCR, CSR #1626
Official Court Reporter